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Coastal Insulation Corporation, and Elmsford Insulation Corporation, and Sealrite Insulation of New York, a single employer and Sergio Santos. Case 22–CA–28439

August 31, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

On April 2, 2009, Administrative Law Judge Earl E. Shamwell issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.¹

The National Labor Relations Board² has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions⁴ and to adopt the recommended Order.

¹ The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and positions of the parties.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed 77 U.S.L.W. 3670 (U.S. May 22, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

³ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

While the judge at fn. 32 of his decision stated that employee Victor Honoret had a phone conversation with employee Manuel Luna, the record establishes that the conversation actually was with employee Rober Luna. Unlike the judge, we find there was no later conversation with Rober.

⁴ There are also no exceptions to the judge's finding that Production Manager Wilson Torres and Field Supervisor Richard Hebbing were supervisors and/or agents of the Respondent under Sec. 2(11) and (13) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Coastal Insulation Corporation, and Elmsford Insulation Corporation, and Sealrite Insulation of New York, a single employer, East Windsor, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. August 31, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Saulo Santiago, Esq., for the General Counsel.

Richard P. Flaum (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, P.C.), of Warren, New Jersey, for the Respondent.

Sergio Santos, pro se, of Paterson, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

EARL E. SHAMWELL, Administrative Law Judge. This case was heard by me on November 24–25 and December 16–17, 2008, in Newark, New Jersey, pursuant to a charge filed by Charging Party Sergio Santos against Coastal Insulation Corporation, and Elmsford Insulation Corporation, and Sealrite Insulation of New York (collectively the Respondent), on July 3, 2006. Santos filed an amended charge on September 22, 2008.

On September 30, 2008, the Regional Director for Region 22 of the National Labor Relations Board (the Board) issued a complaint against the Respondent alleging that it violated Section 8(a)(1) of the National Labor Relations Act (the Act). On October 14, 2008, the Respondent filed its answer to the complaint essentially denying the commission of any unfair labor practices.

At the hearing, the parties were represented by counsel and were afforded full opportunity to be heard, examine and cross-examine witnesses, and introduce evidence. On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs¹ filed by the General Counsel and the Respondent, I make the following.

¹ The Charging Party did not file a brief. Also, the General Counsel filed a motion to correct transcript. Regrettably, the transcript contained many errors which probably were due to the need to utilize an interpreter for many of the witnesses who were not English speakers. The General Counsel's proposed transcript corrections correspond with my notes and recollection of the testimony, and I would therefore grant the motion. The Respondent does not oppose the motion.

FINDINGS OF FACT

I. JURISDICTION—THE BUSINESS OF THE RESPONDENT, A SINGLE EMPLOYER

Respondent Coastal Insulation Corporation is a New Jersey corporation that maintains an office and place of business in East Windsor, New Jersey, and has been engaged in the installation of insulation for residential and commercial entities and properties located in New Jersey, Pennsylvania, and Delaware.

Respondent Sealrite Insulation of New York is a New York corporation that maintains an office and place of business in East Windsor, New Jersey, and has been engaged in the installation of insulation for residential and commercial entities and properties located in New York and Connecticut.

Respondent Elmsford Insulation Corporation is a Delaware corporation that maintains its principal office and place of business in East Windsor, New Jersey, and another facility in Elmsford, New York, and has been engaged in the installation of the insulation for residential and commercial entities and properties in New York.

The three aforementioned corporations are admitted by the Respondent to have been at all material times affiliated enterprises with common ownership, management, and supervision; have formulated and administered a common labor policy, have provided services to each other; have interchanged personnel with each other; have shared common premises and facilities; and have held themselves out to the public as a single-integrated business enterprise; and as such constitute a single-integrated business enterprise and a single employer within the meaning of the Act.²

The Respondent admits that the three aforementioned corporations, during the preceding 12-month period in conducting their respective business operations, individually purchased and received at the West Windsor and/or Elmsford facilities goods and materials located outside the States of New Jersey and New York.

Accordingly, I would find and conclude that Coastal Insulation Corporation, Elmsford Insulation Corporation, and Sealrite Insulation of New York, in the conduct of their respective business operations constitute a single-integrated business enterprise and a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. BACKGROUND AND OTHER PRELIMINARY MATTERS UNDISPUTED ON THE RECORD

The Business of the Respondent

The Respondent is engaged in the installation of weather-proofing insulation to residential and commercial applications covering New Jersey, New York, and Connecticut (the Tristate area). During the relevant period, the Respondent employed about 120 installers. The instant litigation, however, relates

solely to about 22 installers who may be characterized as a cadre of individuals hailing from the Dominican Republic and who spoke English as their second language and seemingly were closely connected to each other by family and friendship ties as well as their common national heritage. For convenience, I will sometimes call these installers the Dominican group.³

The Respondent's managerial hierarchy consists of Steven Schwartz, president, and Bret Schwarz and John Achille, vice presidents. Achille also serves at the Company's operations manager whose duties include supervision of the office and sales staff. The Respondent's field operations are administered by individuals designated production managers and field supervisors. The field supervisors are directly responsible for the supervision of the installers working on any given installation project such as a housing project. The field supervisors report to the production managers who assign installers operating as two or three men crews to various installation projects via e-mail or fax machines provided by management to the crew leader. Brothers Gene Hebding and Richard (Ricky) Hebding, during the times relevant to this litigation, served respectively as production manager and field supervisor for Coastal; Wilson Torres served as production manager for the Sealrite and Elmsford installers until Hugo Tavaréz was promoted to production manager of the Elmsford installers in May 2008.

The Respondent's insulation installers are not paid on an hourly basis. Rather, they are compensated on a piecework basis, generally by a certain amount multiplied by the number of square feet of insulation installed in a given structure. Prior to May 15, 2008, the Respondent paid its installers at the piece-rate of 6 cents per square foot, plus an extra amount for jobs requiring installations over a certain height, crawl space, caulking, site preparation, and extended travel; additionally, the 6-cent rate covered not only the sheet insulation materials but also certain insulation materials that provided ventilation called baffles.

On or about May 15, 2008, the Respondent announced that beginning June 1, 2008, the installers would no longer be paid at the 6-cent rate plus extras, but at a flat piece-rate of 8 cents per square foot, a 2-cent increase, but with no payment for any of the aforementioned "extras."

On July 2, 2008, at about 8 a.m., about 20 or more of the aforementioned Dominican group of installers met at the home of Coastal employee Eduardo Olivo in Paterson, New Jersey, to discuss the new pay system and certain perceived problems associated with its application and implementation. Olivo created a sign-in sheet which was circulated to the attendees.⁴

² The Respondent, in its answer, initially denied that these corporations constituted a single-integrated business enterprise and single employer. However, at the hearing the Respondent, through counsel, agreed and stipulated that the three business entities were a single employer.

³ The 22 installers who are the subject of this cause are listed in the complaint as follows: Coastal employees Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzales, Jairo Gonzalez, and Rafael Gonell; Sealrite employee Rafael Sanchez; and Elmsford employees Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, Epifanio Rosario, Rober Luna, and Manuel Luna. I note that the spelling of the names of some of these persons in some of these exhibits differed from the spelling in the complaint.

⁴ See GC Exh. 2, the sign-in sheet.

Notably, July 2 was a day on which work had been scheduled by the Respondent for some of the gathered employees.⁵ Accordingly, sometime after 8 a.m., Field Supervisor Richard Hebding (Ricky) telephoned Sergio Santos and queried him about his not showing up for work. Santos informed Richard that the employees were meeting at Olivo's house to discuss issues associated with the installers' wages and the new pay structure in particular. At about 9:30 a.m., Santos and Olivo telephoned Gene Hebding (Gene) on the company issued Nextel phone but were unsuccessful in reaching him. However, after a number of attempts, Santos contacted Gene on another employee's (Sandy Genao) company issued cell phone. Santos and Gene conversed initially with the cell phone on speaker so that the gathered employees could hear the conversation. After a time, Olivo and Gene conversed, again with the cell phone on speaker. Notably, Santos and Olivo translated the conversations because the majority of the gathered employees were not conversant in English.

After these conversations between Gene and essentially Santos and Olivo, the Respondent on July 3, 2008, by letters, discharged all of the purported signers of the sign-in sheet, stating essentially that each man was dissatisfied with the terms and conditions of his employment and that he had deliberately failed to report for his assigned work which constituted abandonment of the job, and therefore was no longer employed by Coastal.⁶

The complaint alleges essentially that on July 2, 2008, the employees gathered at Edward Olivo's house, concertedly complained to the Respondent about the Company's failure to pay them their correct wages, and were discharged by the Respondent because of their complaints, in violation of Section 8(a)(1) of the Act.

Thus, the central issue in this cause is whether the Respondent discharged the affected employees on July 2, 2008, because they complained about what they considered problems with the Respondent's payment of wages for jobs performed by them or, as the Respondent contends, because the employees engaged in an unprotected work stoppage because of their dissatisfaction with the Respondent's change in the wage structure.

III. THE PARTIES' WITNESSES

A. The Interpreter Issue

The General Counsel called some but not all of the employees who attended the July 2, 2008 meeting. It should be noted that all of the Respondent's installer employees who testified did so with the aid of an interpreter. During the trial, there

were at various times questions raised by the witnesses about the accuracy of their translations.⁷ In fact, one of the assigned interpreters withdrew from the trial because of questions raised by other Spanish speakers (including the Charging Party) regarding this interpreter's translation of witness testimony. Anticipating this as a problem, I announced at the outset of the trial that I would rely on the interpreter's translation of testimony from Spanish to English, that this translation would constitute the transcribed record. I also extended to the Charging Party the opportunity to challenge what he thought was an inaccurate translation inasmuch as he claimed that the Spanish spoken by Dominicans differed somewhat from the other Spanish speakers, such as Puerto Ricans and Columbians. In fact, I was given to understand that the interpreter who withdrew was Colombian.

All in all, the hearing proceeded with general agreement as to accuracy of the interpretation by the assigned sworn interpreter. However, it is important to note that there were some problems and, in my view, some of the questions posed to witnesses and the answers thereto did not quite jibe. Be that as it may, I listened carefully to the translation but paid particular attention to the demeanor of the Spanish speakers to assist me in determining credibility.

B. The General Counsel's Witnesses

Charging Party Sergio Santos testified that he worked for the Respondent (Coastal) for about 2-1/2 years as an insulation installer whose main duties and responsibilities included installing and repairing insulation for commercial and residential buildings. Santos stated that his employment with the Respondent ended on July 2, 2008. At the time of his termination, Santos said that he was a crew leader who was assigned a company vehicle and a company issued fax machine through which he received his work assignment.

By way of background, Santos described the procedures he followed daily in the performance of his job. According to Santos, his supervisor, Richard (Ricky) Hebding, would customarily fax him his work assignment for the next day at around 7:30-8 p.m. on the day before; the fax would constitute the work order for the job and included the location of the job and the materials needed to complete it. Santos said that as crew leader he would then inform the members of his team of the assignment, pick them up in the company truck, and transport them to the worksite. According to Santos, a crew usually is comprised of two workers, but the crew leader is in charge of the job and is responsible for all reports to management, mainly the field supervisor.

Santos stated that during his time with the Company he did not have a fixed work schedule in the sense of regular report time and ending time. According to Santos, the Company did not require him to be on the job at 8, 8:30, or 9 a.m., and sometimes he reported to a jobsite as late as 10 a.m. Santos said that

⁵ There is a serious question as to what work—by project—was assigned on July 2 to the individual installers who, according to John Achille, were working on average only 3 days per week at the time; some were working only 2 days per week and others were working only 1 day. There was a lack of work according to Achille, but the record supports an inference that some of the installers were or had been assigned work on July 2.

⁶ See GC Exh. 3, a copy of the letter sent to each of the employees who signed the sign-in list, with the exception of two installers. This point will be discussed later herein.

⁷ While some of the witnesses in question testified with the assistance of the interpreter, they evidently knew or understood some English. It seemed that while they were capable of understanding and speaking English, they were more comfortable testifying in Spanish. This point will become more obvious later in this decision.

sometimes if his crew finished a job early, he would be assigned another job in the afternoon. Santos stated that it was only on the occasion of Ricky Hebding's informing him of a special circumstance—the contractor's desires or the late arrival of materials—on a job that he reported on any type of schedule. Accordingly, sometimes Ricky would leave a note for him to get to a job early, for instance one in Pennsylvania. Santos noted that if it were very cold, he would report to the jobsite later in the morning (presumably when the temperatures were higher). Basically, according to Santos, the operative rule for the installers was to get the job done, and they were given much discretion in terms of the times for reporting for and leaving work. Santos stated that the installers' main responsibility was to report to the field supervisor the status of the job that day, i.e., whether it was completed or not.

Santos stated that prior to May 15, 2008, the installers were paid at the piece rate of 6 cents per square foot (of insulation material), plus wages for extra labor for site preparation, installation of baffles,⁸ crawl space installation, and inordinate travel time/distance. Around that time—May 15—the Company announced a change in the wage structure that included a flat 8 cents per square foot rate for all of the material installed on a job; the change was to be effective on June 1, 2008.

Santos testified that, at the time, he questioned Ricky about the preparation pay and Ricky said that site preparation was going to be paid. However, Ricky did not say anything about the baffles and, according to Santos, the Company never mentioned paying for crawl space, preparation, etc. According to Santos, the transition to the new system was not smooth, and in fact to him it was chaotic. Santos stated that installers were being assigned work paying at both 6 cents and 8 cents. The installers felt that if a job was to be paid at 6 cents, then they should be paid for the extras; if not, then at the 8-cent rate. Santos said that he queried Ricky about these problems on several occasions. Santos said Ricky would tell him he was to be paid at 8 cents. However, according to Santos, his check would reflect a payment at 6 cents, but without the extra pay for baffles, preparation, waiting time, or travel.

Santos stated that he continually complained to Ricky who told him that he would refer his complaints to his brother, Gene, because he did not have the authority to deal with the pay issue. Santos recalled that on the occasion of one of his complaints to Ricky, Ricky placed a call to Gene in his presence to inform him of Santos' concern about pay. Santos recalled furthermore that beginning around May 15, he spoke to Gene per-

sonally, perhaps about twice a week about the matter.⁹

Santos described the problems he and other installers experienced with the new pay structure. For example, Santos stated that a work order would be faxed to him listing the amount of material required for the job, and that amount as calculated by the square footage would determine his pay. However, the actual job might require more material than listed, resulting in installation of additional material; this was the salesman's mistake. However, according to Santos, his check would not reflect his having installed more insulation than that listed on the work order. Santos said he spoke to Gene about this problem "every day," as he put it, because it clearly seemed to be a computer-generated problem. However, after a time, according to Santos, Gene stopped communicating with him by not answering his phone and he was forced to deal with Ricky about the problem. Santos stated that he even showed Ricky the paperwork reflecting the short payments problem.¹⁰

Santos stated that he communicated with his coworkers about these problems to alert them to what was happening to him,¹¹ and these persons, crew leaders, also started to complain to the Company. According to Santos, employees were complaining to management practically every day after June 1, 2008, especially to Ricky, but also to Gene Hebding.

Santos noted that he clearly understood that any job coming in after June 1, 2008, would be paid at the new 8-cent rate, and any job coming in before that date would be paid at the old rate, with the extras. However, according to Santos, this did not happen. Moreover, his and his coworkers' complaints were being met with inaction and excuses, such as corporate "glitches." Because of the Company's failure to address, let alone redress, the pay issues and the discrepancies in pay in particular, he and his coworker, Eduardo Olivo, decided not to go to directly to work on July 2, 2008, but instead called a meeting with the installers working for Coastal, Elmsford, and Sealrite with a view towards drafting a statement (petition) to present to the Company, resolve the issues, and thereafter go back to work.¹²

⁹ Santos stated that the installers actually were not sure that the wage change would be effective June 1, but, because of the announcement on May 15, started looking for changes at that time.

¹⁰ Santos said that he showed Ricky the work orders which indicated the number of square feet of material for the job and the corresponding number of bags of material used on the job, resulting in a discrepancy of perhaps a dozen square feet.

¹¹ Santos testified that he specifically spoke to coworkers Victor Nieves, Eduardo Olivo, and Sandy Genao about the problem with pay.

¹² Santos believed this would be a viable approach to resolve the pay issues because of his success in resolving a similar pay dispute on April 2007. According to Santos, at that time Coastal installers were also experiencing problems with the then new pay (6 cents) system as well as a number of other job related problems, including inadequate and even dangerous job conditions and contractors' demanding that they install noncompany materials. The affected employees refused to work on that particular jobsite and Gene Hebding, in response, told them to leave the job. As a result, all of the crew teams left the job, but he and three others were suspended by the Company. Later, Eduardo Olivo and he asked to meet with Gene Hebding at the Company's office. Gene asked them to meet instead at a nearby Dunkin Donuts shop; and, later, around 15–16 Coastal employees met with Gene and Field Super-

⁸ Santos described baffles as an insulation material (thermofoam) that is often installed in the ceilings of a building between the ceiling and the insulation—to keep the insulation fresh, to allow it to ventilate. Santos said that this material is installed all around the house and is often more difficult to install than the (sheet) insulation material. According to Santos, baffles are also measured like the ordinary foam insulation material, that is in square footage. Santos noted that around April 2007, the Respondent announced a new wage structure that included an extra 3 cents per square foot for installations entailing heights of 10–15 feet. The new scheme originally did not include extra pay for crawl space installation but this matter was resolved and the installers were paid for crawl space work at the rate of \$15.

Turning to the July 2, 2008 meeting, Santos testified that about 22 employees of the three companies decided to meet at Eduardo Olivo's house with the purpose (as he put it) of "making a document" to read to the Company to explain why they were complaining about the pay issues they had experienced for the whole month of June. According to Santos, the hope among the employees was to arrive at a suitable agreement as the Coastal employees had accomplished in April 2007. Santos noted on this point that while the Elmsford and Sealrite employees had not participated in the April 2007 meeting, they were aware of the problems of Coastal workers at that time. Since they were now having the same problems in 2008, the Sealrite and Elmsford wanted to join the common cause and agreed to meet with the Coastal workers.

Santos testified that at around 7:30–8 a.m., ultimately about 21 workers attended the meeting at Olivo's home on July 2. Santos noted that another person, Manuel Luna, did not attend but approved both placing his name and that of his brother, Rober, on the sign-sheet he and Olivo devised.¹³ According to Santos, the gathered installers discussed the pay issues, including money missing from their checks because of the discrepancy between the material installed by them and the work order list and the preparation expenses. Santos said that these matters were going to be put in a letter but because of later events that morning, no letter was prepared. Santos explained what occurred.

Santos testified that he first attempted to call Ricky at around 8:30 a.m., but Ricky did not answer; Santos left a message for him. According to Santos, Ricky called him at about 9–9:30 a.m. asking why he had not shown up for work. Santos stated that he told Ricky of the outstanding problems and that if the Company and the installers at the meeting could come to an agreement, they would return to work. According to Santos, Ricky said that he was aware of the situation but he was powerless to do anything; he would speak to Gene about the matter. Santos said he also told Ricky in this conversation that the workers were expressing their concerns and that Olivo was taking notes to include their concerns in a document to be submitted to the Company, and Gene in particular.

Santos said that around 9:30–10 a.m. he spoke to Gene on a cell phone of one of the other installers; the phone was put on speaker so that all of the gathered employees could hear. Noting that he and Olivo were standing next to each other and translating Gene's comments for those who did not understand

English, Santos stated that he told Gene that they were meeting to deal with the problems and were going to draft a document (setting out their concerns) and fax it to the Company.

According to Santos, Gene said that he did not want any such document and not to send it to the Company. Gene then went on to explain the reasons the Company was making the changes. However, Santos said that he interrupted Gene, telling him that in order to communicate effectively, the workers had to explain to him what their concerns were and then the Company could give its reasons in response. According to Santos, Gene continued to talk without letting him get a word in, and then abruptly stated he no longer wanted to speak with him and to put Olivo on the phone.¹⁴

In the end, Santos said that Gene told the group "if we did not say what the company said, we were terminated" (Tr. 65).¹⁵ In spite of this sentiment from Gene, Santos said the employees (he and Olivo) told him that they were not quitting, that they wanted to return to work. According to Santos, Gene said that if we were quitting, to bring the trucks back to the Company. However, Santos said that he and/or Olivo told Gene that if he was indeed firing the workers—they were not quitting—that he should retrieve the company trucks himself.

Santos testified that the Company picked up the vehicles on July 2 around 4:30 p.m., based on calls he received from the New York (Elmsford) installers, and Gene himself retrieved Santos' truck from his house.¹⁶

Santos said that he received by certified mail his termination letter (GC Exh. 3) from the Company on the following Monday (July 7), having picked it up from the post office that day. Santos noted that he had received on July 1 a work assignment for July 2; however, in spite of still having the company fax machine in his possession, he received no work orders for July 3. Santos further noted that after receiving the termination letter, he made no further contact with the Company; he believed that he was fired on July 2 because at no time did Gene ask him to come back to work the next day and discuss the outstanding issues.¹⁷

¹⁴ Santos noted with amusement that Gene never let anyone talk and the gathered employees actually were laughing while waiting for a break in Gene's monologue.

¹⁵ I would note that this is one such instance where the adage, "something was lost in translation," has meaning. Santos said later in his testimony that Gene did not actually engage in a conversation with the gathered employees. Rather, Gene engaged essentially in a monologue and interrupted him and Olivo as they tried to speak. To Santos, Gene clearly conveyed the threat, "Accept it (the Company's methods) or you are terminated." (Tr. 73.)

¹⁶ Santos stated that he was not home at the time, but his mother informed him that Gene was there to pick up the truck. Santos said he spoke to Gene, telling him that his mother would provide the keys. Santos said that he asked Gene if he were fired, and Gene said that he thought so.

¹⁷ Santos said that on July 2, he complained to Gene specifically about discrepancies in the paycheck he had received the previous Monday. Santos stated that he compared his personnel records and the check amount and determined that he had been underpaid. He noted that in speaking for the group and their collective concerns, he covered job-related matters such as crawl space, preparation, long trips, and the like.

visors Ricky and Andy Eschele. According to Santos, at this meeting the Coastal employees and management, *inter alia*, resolved some of the outstanding pay issues, established a rotating work schedule so that the installers could equitably receive work in the slow economy of the time, and rescinded the suspensions for the employees who had refused to work the dangerous jobsite. According to Santos, no one lost his job or was disciplined for making the demands and engaging in the action they took.

¹³ See GC Exh. 2. Santos identified by their numerical placement on the list 13 Coastal employees, 8 Elmsford workers, and 1 Sealrite worker. According to Santos, Manuel Luna had been telephoned by another Elmsford installer, Victor Honoret, at the meeting and, as Santos understood, agreed to have his name and that of his brother, Rober, placed on the sign-in sheet.

Santos admitted that he did not call Gene to tell him he was not going to work on July 2, because he believed he had been terminated, nor did he contest the Company's claim that he had abandoned his job. Santos testified that he did speak to Ricky on many occasions after July 2, and told him that he wanted his job back but wanted to be paid honestly—for example, to be paid the 8-cent rate for all material used on a job, and to include the baffles—a point he raised in the July 2 conversation with Gene.

Eduardo "Eddie" Olivo testified that he has worked as an insulation installer for Sealrite and Coastal for a combined 10 years, 9 of the 10 years having been spent in the employ of Coastal. Olivo stated that in 1997, he was hired by Wilson Torres, the Sealrite manager at the time. When he began working for Coastal, his immediate supervisor was Andy Eschele and later Ricky. Olivo noted that he was a crew leader and, as such, was provided a fax machine and a vehicle by the Company.

Olivo related the circumstances and issues surrounding the Respondent's change in the installers pay rate in 2008. Olivo stated that he could not recall the actual day the Company announced the pay rate change from 6 cents per square foot to 8 cents per square foot, but recalled that he received such notice early one morning in June 2008, while working on a job for which he was to be paid at the 8-cent rate. However, Olivo noted that he had heard sometime in May a rumor (his word) of the change through Santos who claimed that Ricky told him of the change. Olivo later learned of the change grapevine-fashion from Ricky and another supervisor, Ritchie (last name unknown).

Olivo stated that once the new rate was announced, the employees thought the new rate covered all of the (insulation) materials used on a job as stated on the worksheet which listed all the materials—for example, the baffles. Olivo said that it was also his assumption then that everything for which employees were paid at 6 cents were now to be paid at 8 cents, including the baffles.

However, according to Olivo, problems arose and, on one occasion, he received a check reflecting payment at 8 cents for some materials and 6 cents for other materials; this check reflected no payment for the baffles, but payment for waiting time. Olivo testified that he reported this to Ricky who said he would speak to Gene about the problem. Olivo stated that he spoke to Ricky nearly every day until he tired of the exercise. Olivo said that he also spoke to Gene about his concerns about the new wage rate—all to no avail. Olivo said that after a time, Ricky merely laughed when he made his complaints. In any case, Olivo said that his complaints were all to no avail, but he continued complaining just to make himself feel better.

Olivo testified because the pay situation was not being addressed, let alone resolved, he and some other installers, namely Jorge Jimenez and Victor Honoret—Elmsford installers—discussed the wage-related problems they were all experiencing. So on or about July 1 they decided to convene a meeting of the Coastal, Elmsford, and Sealrite installers at his house on July 2.

By way of background, Olivo related that in April 2007, the Coastal installers were not only experiencing problems with

their pay but also were not working full time; they registered their complaints with their supervisors (Eschele and Ricky) and Gene. One day, the Coastal installers decided to have a meeting about the outstanding issues with Gene, who initially declined to meet with them. Nonetheless, the workers all met at Eddie's house and then proceeded to the Company's offices to force the issue. On the day in question, the workers did not report for their assignments but, at about 8 a.m., descended on the office. According to Olivo, Gene was forced to meet with them and requested that instead of meeting at the office to assemble at a local Dunkin Donuts shop.¹⁸ At about 9 a.m., the employees and Gene met, and discussed the employees' concerns which included short payments and less than full-time work.

As a result of the meeting, Olivo stated that Gene and the workers arrived at a satisfactory resolution of the issues. Olivo noted that with the exception of one installer, Victor Nieves, none of the protesting installers went to work that day; however, no one was disciplined as a result. According to Olivo, it was with this positive and successful experience in mind that the installers decided to meet on July 2, 2008, to resolve with management the ongoing problems with pay.

Olivo testified that the installers for the three companies met at his house on July 2 at around 8 a.m., at which time they expressed to him their problems and complaints. Olivo noted that a majority of the workers did not speak English although some understood the language. Accordingly, as originally planned, he was chosen to deliver the complaint to Gene by way of a letter (petition), which was to include complaints about the wage shortages and nonpayment for the materials used on a job. According to Olivo, the employees planned to go to work that day, thinking that Gene, who was viewed by all the workers as a conscientious person, would resolve the outstanding issues.¹⁹ According to Olivo, the workers were simply hoping that Gene at a minimum would tell them that all of the issues would be resolved, and would have gone to work with that assurance.

Olivo stated that before the meeting commenced he called Ricky to inform him of the meeting, but Ricky would not answer his phone. Olivo also noted that his brother-in-law, in-

¹⁸ Olivo intimated that in April 2007, the Elmsford and Sealrite employees did not participate in the Dunkin Donuts meeting because while they were experiencing the same or similar problems, they did not trust the Coastal installers. The successful negotiation in April 2007 changed their minds in July 2008.

¹⁹ Olivo insisted that in spite of company claims to the contrary, the installers did not have a scheduled time to report for work. According to Olivo, the Company's policy and practice was to finish the job in 1 day, and how this was accomplished was left to the installer; that an installer made his own schedule; and some installers commenced work as late as 10 a.m. Olivo noted that installers are not paid by the hour but by the square foot, so the speed at which one worked governed the job. He stated that most installers went to work early in the hope of finishing the job early or to get another work assignment. Olivo stated that it was his custom to start early at 8 a.m. and because of his experience he was not required to check in with the supervisor nor they with him, unless there was a problem. Olivo said as his regular practice, he called Ricky in the morning to provide a status check for the job or sometimes simply to exchange jokes.

staller Ramon Fermin, had also tried to call Ricky at around 6 a.m. that day, but again Ricky did not answer. At about 8:30 a.m., Olivo said that Santos placed a call to Ricky and reached him; the phone was put on speaker so that the workers could hear the conversation. Santos told Ricky that a message had been previously left for him about the meeting and that the employees wanted to speak with Gene. According to Olivo, Ricky said that he would call Gene, inform him of the meeting, and have him call back.

Olivo testified that he continued to try contacting Gene but to no avail. However, installer Sandy Genao reached Gene on his cell phone at around 9–9:30 a.m. Genao gave the phone to Santos who put the phone on speaker and a conversation with Gene ensued, initially with Santos.

According to Olivo, the conversation was not productive in that Gene would not let Santos speak to explain fully what was going on, the reasons for the meeting and the complaints. According to Olivo, Gene continued to overtalk Santos and ultimately told Santos that he no longer wanted to speak with him; Santos handed the phone over to Olivo.

According to Olivo, Gene beratedly said that Olivo was in a meeting and not reporting for work over some miserable baffles. Olivo said he told Gene that the meeting was not solely about baffles but everything that is going on with the Company and its treatment of the installers. Then, according to Olivo, Gene said, “Eddie, that’s what we got, if you don’t like it, you know what to do; if you don’t take it, you’re out.” Olivo testified that he then told Gene that “we were not quitting,” whereupon Gene said, “[I]f you guys are not going to work, then bring me the trucks.” Olivo stated that he responded, “[I]f you are firing us, to come and get your own trucks.”²⁰

Olivo stated that the Company started the vehicle retrieval on July 2 at around 4:30–5 p.m. based on a call he received from Genao who told him his truck was then being picked up and inquired what he should do; Olivo told him to release the truck. Olivo noted that other installers’ trucks, including his own, were picked up by management around 5 p.m. and, in fact, Wilson Torres and Gene picked up his truck.

Olivo said that he later received a letter from his health insurance carrier informing him that his coverage was canceled as he was no longer employed by the Company;²¹ he did not receive an official termination letter from the Respondent.

Olivo insisted that Gene never told the workers in the July 2 call that if they called by 5 p.m., they could come back to work. Olivo testified that Gene said in terms very clear to him that by 10 a.m. everyone at the meeting was fired. In fact, according to Olivo, Supervisor Wilson Torres later said that everyone who signed the letter (GC Exh. 2) and everyone who talked to Gene was fired.²²

²⁰ Olivo noted that he and Santos were translating Gene’s part of the conversation simultaneously to the employees, all of whom wanted to know what was happening.

²¹ Olivo identified GC Exh. 3(d) as a copy of the Respondent’s termination letter signed by Gene Hebding that he received from his insurance carrier.

²² Olivo admitted that he did not tell Gene who precisely was in attendance at the meeting because Gene’s domination of the discussion did not give him a chance to tell him. He noted that Wilson Torres, the

Olivo noted that as crew leader, he received his work assignments by fax. Olivo stated that his last day of work was July 1, 2008, and that he had not received a fax assigning him work for July 2. Olivo also stated that he still possessed the company fax machine and he never received a work assignment for July 3.²³ Olivo steadfastly denied ever telling Gene that he would not go back to work unless the Company paid him 8 cents plus all materials used; nor did he tell Gene he would not return to work if they continued to pay him as they were in July 2008. Olivo volunteered that he thought the 8-cent rate was a good deal for him and was a raise; however, he thought the raise applied to all material used in a job but in practice this was not the case.

Olivo also denied that Gene ever told him (or the employees) that he could come back to work. He admitted that Gene told the group on July 2 words to the effect that the Company was paying what it was, and that could not be changed; “[I]f you want to come back to work, come back to work.”²⁴

Victor Nieves testified²⁵ he had worked for Coastal for 6 years as an installer, and his last immediate supervisor was Ricky Hebding. Nieves said that he was a crew leader.

Nieves stated that he recalled attending the meeting of the Respondent’s installers on July 2, especially since it was the date he considered himself fired by the Company.²⁶

According to Nieves, the meeting started around 8 a.m. and he recalled that about 20–22 persons attended with a view to deal with and discuss the problems employees experienced for several months with Coastal about pay—specifically the raise from 6 to 8 cents and the failure of the Company to pay them for material used on the job. While Nieves did not elaborate, he insisted that the problems were longstanding.

Elmsford supervisor, knew the New York installers were there and Gene and Torres share adjacent office space. Olivo emphasized that Gene did not say the workers *will* be fired; rather, he said they *are* fired. Olivo stated he had the impression Gene knew about the sign-in sheet because Victor Honoret told him that the “paper”—the sign-in sheet—and a letter was going to be prepared; that Gene asked Victor who had signed, and Victor told him at least the names of the five New York installers.

²³ It should be noted at this juncture that the Respondent produced no work assignment documentation for July 3 for any of the affected employees.

²⁴ Olivo was at this point under cross-examination and was confronted by transcript records of his testimony at the 10(j) hearing before Federal District Court Judge Thompson. Olivo complained that he was confused by the judge’s question and her insistence on a yes or no answer; in his view, the judge would not permit an explanation. (Tr. 226.) He confessed that he did not know what he meant by his transcript answer. Here, again, the 10(j) proceeding to my understanding was conducted at least in part with the assistance of an interpreter. I know firsthand there are, as earlier stated, problems associated with translations. I also note that I do not know the total context of the examination of Olivo in Federal Court. Accordingly, I will instead rely on my own impression of the testimony of witnesses at the Board hearing.

²⁵ As with all of the General Counsel’s employee witnesses, Nieves testified in Spanish.

²⁶ Nieves identified his signature on the sign-in sheet (GC Exh. 2). He recalled that he saw other individuals sign as the sheet was passed around the group.

Nieves stated that the pay raise was announced in May 2008 by the Company not as a proposed, but established fact. Nieves testified that he found out about the change through another supervisor (Ritchie), not his immediate supervisor, Ricky Hebding. According to Nieves, "Ritchie told me that there was to be a raise in 30 days from 6 to 8 cents, that everything was going to be paid at 8 cents per square foot." Nieves conceded that Ritchie did not say the baffles were going to be included in the new rate.

Nieves said that after the announcement, problems arose in terms of the amounts he believed he was entitled for a job and that which he received on his check; essentially, he was missing money. Nieves stated that he was sure he was being shorted because as crew leader he kept track of the materials he used on his jobs, and in his end of day reports to the Company he recorded the numbers for all the materials used. At the end of the week, however, he noticed that his check amount did not match the material numbers. In such cases, Nieves said that he would call the office on the following Monday to complain. Nieves testified that during the first month of the change he complained weekly, usually to his immediate supervisor (Ricky). After a time, Nieves said that he made his complaints directly to Gene Hebding.

Nieves noted that because his English was not good (and Gene spoke no Spanish) he was given permission by Gene to speak to his secretary, Sharon Perez, about his concerns. Nieves stated that he mainly spoke to her weekly and complained about money missing from his check. According to Nieves, Perez would usually give him an answer on Monday afternoon saying that the amount would be made up on the next check; or there was some clerical error; or the computerized pay system had experienced some problem or the other; or even that a new secretary was handling payroll. According to Nieves, while there was always some excuse given for the discrepancies in his pay, he never received his corrected pay.

Nieves said that the July 2 meeting was called by the employees to deal with this type of problem, which was experienced by both the Elmsford and Sealrite installers. Nieves noted that the employees actually were pleased with the raise from 6 to 8 cents per square foot, even with the proposed removal of pay for extra labor. However, according to Nieves, in practice, while the Company claimed to be paying 8 cents, they were only paying 6 cents for some of the material used on the job. So along with "missing money," the employees were concerned about the way the new system was being implemented; for instance, baffles were insulation material but the workers were not paid at 8 cents for all material as they were led to believe would be the case.²⁷

Nieves testified that the installer meeting commenced at around 8 a.m., and calls were placed to Gene immediately; however, he did not answer his cell phone. So the calls were placed through Gene's walkie-talkie. According to Nieves,

Gene was reached at about 9–9:30 a.m. Nieves stated while trying to reach Gene, Santos, who did the calling, reached Ricky around 8:30 a.m. and explained over the speaker phone to him what the group was meeting for. According to Nieves, Ricky said that he was aware of what was going on and so was Gene.²⁸

Nieves testified that Santos explained to Gene what was going on with the employees, but the conversation was very "difficult" (his word) because Gene would not let Santos speak; Gene spoke a lot and adopted the position that he did not want to hear any "reasons" from them. Ultimately, according to Nieves, Gene said that he no longer wanted to speak with Santos but only to Eddie (Olivo).

Nieves said that Gene told Eddie to return to work, as well as whoever was in the meeting. According to Nieves, Olivo told Gene that we were never going to quit; that we want to fix the situation, whereupon Gene then responded that's what it is, "accept or we're fired." Gene then said that he wanted the men to return the vehicles. Nieves said that Olivo then told Gene "if we are fired, the Company should come and retrieve the vans." According to Nieves, his coworker, Frederico DeLeon, called him to say that Gene and Wilson Torres were picking up the trucks by around 4:30–5 p.m. Nieves stated that DeLeon told him that Torres had told him that "we, including DeLeon, were fired."

Nieves stated that he had no scheduled work for July 2 and even called the night before and spoke to Ricky about work for the next day, as well as the morning of July 2. So he and Frederico DeLeon did not have any work assigned to them for July 2.²⁹

Nieves stated that he never received an official termination letter from the Company, but received a notice about 15 days after the meeting informing him that he was covered by Cobra (insurance).

Victor Honoret testified that he has worked for Elmsford Insulation since about July 10, 2001, as an insulation installer working in projects in Connecticut, New York, and New Jersey. Honoret stated that during the time he was employed, he acted as a defacto crew leader, essentially working a two-man crew comprised of himself and coworker Cesar Cardenas.³⁰ Honoret described Wilson Torres as the supervisor to whom he reported and provided all paperwork to each assignment. Honoret also volunteered that he had submitted his application for employment to and was hired by Wilson Torres.

Honoret recalled that the Company instituted a change in the installers' wage rate around May 2008 (about 2-1/2 months before July 2, 2008), but he was not officially informed of the

²⁸ Nieves stated that while he did not speak English very well, he did understand English after a fashion.

²⁹ DeLeon did not testify at the hearing. It seems that DeLeon was a member of Nieves' crew. As crew leader, Nieves possessed the company fax machines and received his assignments through that medium; Nieves also stated that his assignments arrived through e-mails. Nieves said that his assignment usually came from Gene, or from Gene through Ricky.

³⁰ Honoret said that he actually was not an official crew leader, but he was assigned and drove the company van, handled all the paperwork for jobs, and received at his home the faxes assigning his crew work.

²⁷ Nieves testified at the 10(j) hearing in Federal District Court and was questioned by the Respondent's counsel about his testimony there regarding the pay issues. Nieves said he answered questions as best he could that were put to him by the interpreters and as he understood them.

change in the Company. According to Honoret, he became aware of the change by virtue of his paycheck, which indicated a change in his pay. Honoret said that at the time he consulted with Torres about the matter. According to Honoret, Wilson simply laughed about the issue and did not explain what had transpired with his pay. Honoret stated he spoke to Torres personally on several occasions during this time about the pay situation but Wilson would merely say the new pay structure was better for the employees and was otherwise evasive and broke off the conversation.

Honoret testified that he disagreed with Torres' assessment because the Company under the new wage structure ceased paying for the extras, that at 8 cents the installers, in his view, were performing the extra labor—for caulking, heights, baffles—for free and these items made for a big difference in his pay.

Honoret said these issues were discussed by the installers, especially the nonpayment for extras, the "inconvenience" (his word) of the way the new system was working.³¹

Honoret recalled July 2, 2008, as "the day we're taken out of the Company" (Tr. 114) and the employees met at Eduardo Olivo's house. Honoret volunteered that while he did not tell Torres about the specific meeting on July 2, he did tell him that employees were gathering so that there could be more "force" (influence) with management. Honoret believed that Torres knew of the planned meeting.

Honoret stated that his coworker, Jorge Jimenez, had contacted the Coastal employees about the meeting and later told him that the Elmsford workers were going to meet at Olivo's house. According to Honoret, Jimenez told him the plan was to meet and deal with the pay issue ("the points not in our favor"). In the end, about 20 some installers attended the meeting on July 2.³²

Honoret testified that the change in pay from 6 to 8 cents was discussed among the attendees, and the concern among some was the nonpayment for the extra labor items which in effect reduced their pay.

According to Honoret, while Santos led the meeting which started at about 8 a.m., he did not regard him as the head or leader of the group because the problems the employees were experiencing were common to all.³³ Honoret said that when

Santos contacted a man named Gene by phone, he put the phone on speaker, and he and Eduardo translated for those like himself who could not speak English.

According to Honoret, Gene said that everybody who signed the paper was out of the Company. Honoret also noted that Wilson Torres told him the same thing. According to Honoret, after the meeting he called Torres around 9:30 on July 2 on the company phone and told him the employees were meeting at the time and were going to send him a list of the employee proposals. According to Honoret, Torres then told him, "You're out." According to Honoret, Torres also asked him who was at the meeting, but Honoret refused to divulge the names. Honoret said that Torres then ended the conversation by saying that we were all out. (Tr. 121.)

Honoret noted that on July 3, management employee Hugo Tavaréz picked up his company vehicle sometime after 5:45 p.m. and left a message at his residence saying that the Company had instructed him to pick up the truck.

Honoret testified that he has not worked for the Company since July 2. Honoret acknowledged that he did have a work assignment for July 2 and he was planning to go to the job around noon that day. Honoret went on to say, however, he was not given any work assignment for July 3.

Samuel Ramon Fermin testified that he has worked for Coastal for about 8 years as an installer and was part of the Olivo crew along with a coworker, Samuel Figaro.

Fermin said that he attended the July 2, 2008 meeting³⁴ of the installers at Eddie Olivo's house but the problems the employees were experiencing preceded the meeting. Fermin explained, stating that the Company instituted the wage rate change to 8 cents and his understanding was that the move was designed to improve their pay. However, Fermin said the Company in reality was not paying 8 cents because there was no pay for all the material, especially the baffles used on a job. Fermin stated that his understanding was that under the new system, installers were going to be paid for baffles and preparation work. Fermin also cited the example of his having been paid 6 cents for a job that called for the 8-cent rate; he believed that the Company in practice was paying installers what it chose to pay and they certainly did not pay for any extra labor; this was essentially a backpay issue to Fermin.

Fermin said that these problems were discussed among the workers prior to July 2 and they decided to meet to resolve these problems and try to get an agreement from Gene.³⁵ According to Fermin, he and the other workers clearly knew what the meeting was about—for instance to correct the backpay issue—and having communicated their common concern to one and the other, they decided to meet and hopefully reach some agreement to resolve the problems as they had done in 2007.

³¹ Honoret stated that on occasion two crews may be assigned to a project and on these occasions installers like Jorge Jimenez, Rafael Sanchez, Batista, and Rosario would discuss the pay situation. It should be noted that each of these persons' names appear on the sign-in sheet for July 2.

³² Honoret noted that Manuel Luna and Rober Luna did not attend the meeting, but in a telephone conversation he had with Manuel, he was instructed by Manuel to put his name and that of his brother Rober on the sign-list. Honoret said he later spoke to Rober who, in the conversation, agreed to have his name on the list because he was concerned that installer pay had been reduced.

³³ On cross-examination, Honoret said that the "proposal at Eddie's house was about the pay, we were working the same but earning less." Honoret stated the employees were willing to work for 8 cents and get paid for extras. (Tr. 226.) Honoret stated that the purpose of the employees was to get an agreement by talking to management. In his view, the employees wanted to get paid for the baffles, height, and caulking at the 8-cent rate.

³⁴ Fermin identified his signature on the sign-sheet (#7) and noted that he saw others sign it in his presence.

³⁵ On cross-examination, Fermin stated (paraphrased) that for his part, he would gladly take the 8 cents per square foot because this was "just." But the "problem" was that the Company promised to pay for all of the square feet of material at the 8-cent rate—but the situation got worse. Fermin said the employees were happy to make more money. (Tr. 258.)

Fermin emphasized that the employees did not meet to stop work, but only to get an agreement about the problems from management.

Fermin testified that the meeting in Olivo's backyard started around 8 a.m. and perhaps 22–24 workers attended. At around 8:30 a.m., Fermin said he placed a call in to Ricky but he did not pick up; Fermin left him a message. About the same time, but on a different phone, Fermin noted that Olivo was trying to reach Ricky, but was only successful at around 9:30–10 a.m. Fermin stated that he understands some English³⁶ and could therefore hear and follow Olivo's conversation with Ricky over the speaker phone. According to Fermin, Olivo told Ricky that in case he spoke to his brother, Gene, the workers were then gathering as a group discussing the problems. He noted that both Olivo and Santos were translating Ricky's part of the conversation to the group. Fermin said that either Olivo or Santos told Ricky that "we wanted to speak to your brother so he could help us resolve the problem—the Company's agreement to pay us 8 cents but actually not paying us; we want to be paid for the baffles (material) as well as for height and preparation—we are here as a group to clear up the problem." In the end, Fermin said that Santos told the group that Ricky was going to speak with Gene.

Fermin testified that at around 10:30 a.m. Santos was able to reach Gene on Sandy Genao's cell phone and, with the phone on speaker, began a conversation with him; Olivo translated for the group. According to Fermin, Sergio related to Gene the employees' problems. Then Gene told Sergio to put Olivo on the phone, whereupon "Olivo took up the conversation and asked Gene to pay us 8 cents, to include the baffles, and to reinstate preparation pay." According to Fermin, Gene said, "Well Eddie, this is what it is and if you don't like it, bring me the vans." Then Eddie asked, "Gene, are you firing me; if you are, come and look for the trucks." Fermin noted that although Sergio was translating the conversation, the employees understood what was being said as he himself did.

Fermin testified that at no time in the conversation did he hear Gene say exactly or words to the effect, "if you come back by 5 p.m., you can come back to the Company." Fermin said that he understood Gene to say that was what it was and "if you don't want it, leave."³⁷ Fermin recalled that Olivo (the head of his group) told Gene, "I don't want to leave the job in New York, and if you are firing me, come and look for [get] the truck."

Fermin testified that the Company started picking up the trucks at around 4:30 p.m. and picked up Olivo's at truck around 6 p.m. Fermin stated that he was saddened by the turn of events; he thought that the Company would come to an

agreement over the outstanding issues "like what happened in 2007" (his words, Tr. 248) when the Company and the workers came to an agreement—problems were fixed and "we all went to work." Fermin stated that he firmly believed that Gene fired the group on July 2, a fact in his mind confirmed when the trucks were retrieved. He asked rhetorically, "How could we work without the trucks and the machines we used for work." (Tr. 258–259.)

Fermin noted that he did not receive a work assignment for July 3 from Coastal on July 2. However, he did reapply for his employment with Coastal on August 8, 2008, at which time he filled out a new application and even left a blank check with the secretary to begin automatic deposit. Fermin stated that he, however, never actually was rehired and has never called the Company about the job.³⁸

Fermin noted in passing that while employed by the Company, he had taken leave time beyond 1 week of paid vacation allowed by the Company, but had never had to reapply for his job. Fermin said that Gene did not explain why he was required to fill out a new application on August 8.

Epifanio Rosario testified at the hearing. Rosario stated that he worked for Elmsford Insulation as an insulation installer assigned to the crew of Jorge Jimenez, his crew leader. Rosario identified his immediate supervisor as Wilson Torres.

Rosario stated that he attended the July 2, 2008 meeting of employees from Coastal. Rosario said that prior to the meeting, sometime in May (2008), Wilson Torres told him the Company was going to change the installers' pay rate from 6 to 8 cents per square foot of material, effective after May 30.

According to Rosario, the employees met on July 2 to deal with certain issues associated with their receiving incorrect pay and to file a complaint with the Company. Rosario stated that Jimenez told him that he did not have work assigned to his crew that day so the men were going to meet to deal with pay issues at Eddie Olivo's house. Rosario said that Honoret, Cesar Cardenas, Fedham Gonzalez, and he all drove to the meeting in the same car. He noted that other installers, Rafael Sanchez and Tony Batista, Sealrite and Elmsford installers respectively, also attended the meeting. According to Rosario, these installers all knew what the meeting was for and about because they had discussed the meeting and the issues previously.³⁹

³⁶ I would note that Fermin's testimony in places on the record reflects either a translation problem or transcription problem. I am not sure if he was comprehending the questions posed to him in English by counsel and me, and then responded in Spanish based on that understanding, and that response was provided by the interpreter in English. This did not reflect adversely on his credibility in my view, but should be noted.

³⁷ In answer to my query, Fermin stated that he understood what Gene was saying at the time and did not have to rely on Olivo's or Santo's translation.

³⁸ Fermin explained the circumstances surrounding his attempt to hire back with the Company. According to Fermin, he and Sandy Genao met with Gene pursuant to Genao's conversation with Gene from Santo Domingo after the July meeting; Genao told Gene that both he and Fermin wanted to return to their jobs. Fermin said that Gene asked the two to meet with him and to bring document such as passports, social security cards, and licenses. Fermin said that he and Genao met with Gene on August 8 and Gene promised him that he would be working the following Wednesday. This did not come to pass.

³⁹ Rosario provided some background to the employees' concerns about pay. As I understood him, Rosario noted that under the 6-cent per square foot pay option, the workers did not always receive the correct amount. The workers waited for corrections, but the situation was not corrected completely as he put it, that is, the corrections were made for some installers but not for others. He also cited as an example that in June (2008) the installers' pay was 6 cents and 8 cents, but baffles and caulking were not being paid in either case. Rosario also

Rosario testified that the meeting started at 8 a.m. and about 21–22 employees attended.⁴⁰ Rosario stated that while he did not personally participate in the conversations ongoing among the workers, the central topic was about pay, that is, the installers were supposed to make 8 cents per foot, which in his and their view should have included baffles and caulking. Accordingly, Rosario said that he attended the meeting to support his coworkers to “reclaim” their rights. Santos and Olivo were chosen to relay the workers’ concerns to management.

Rosario stated that Ricky and Gene were called by Santos and Olivo between 8–10 a.m. According to Rosario, Santos and Olivo spoke first to Ricky over the speaker phone, and later they conversed with Gene. Rosario admitted that he could not recall the substance of what Gene said over the speaker phone.⁴¹

However, Rosario testified that later after the meeting, Victor Honoret told him that Torres had told Honoret that all of those who signed at the meeting were all fired. Rosario noted that he knew that Honoret had told Torres about the meeting beforehand and that the employees were meeting about pay.

On cross-examination, Rosario stated he did not recall Santos or Olivo, or anyone for that matter, telling him (or the group) that the workers could come back to work but that Gene could not change the pay. However, Rosario volunteered that the workers did not oppose the 8-cent rate, in fact they were happy about this; the change was okay with them. According to Rosario, the issue for the workers was that the pay was not “correct.”⁴²

Rosario identified the termination letter he received on about July 4 or 5 from the Company (GC Exh. 3), but noted that he understood from having the letter read to him that he was fired for abandonment of his job. Rosario, however, stated that Jimenez had told him that there was no work assigned his crew for July 2 and, in part, that was why he and they attended the meeting.

Odalís Gonzalez testified that he has worked for Coastal since August 6, 2006, as an insulation installer; he submitted his original employment application to Gene Hebding through his brother and fellow installer, Anbiory Gonzalez, who was his crew leader.

Gonzalez stated that he had injured himself at home in late

June 2008 and was not able to work. However, Odalis said that he did attend the July 2, 2008 meeting of the installers as did several of his other relatives.⁴³

Gonzalez testified that the July 2 meeting started between 7 and 8 a.m. and he signed the sign-in sheet as did his relatives. Gonzalez noted that the meeting was called basically by Santos and Olivo to attempt to reach an agreement with management over pay issues. The installers knew what the meeting was about that day. Gonzalez explained that the Company had proposed an increase in pay for the amount of material used on a job, but in point of fact management did not “comply” (his word)⁴⁴ with what they were offering. Gonzalez stated that he knew that the increase was to 8 cents per square foot, but admitted that he did not know if the rate included baffles. Accordingly, Olivo and Santos told him that they were going to get together to reach an agreement with the Company because of its noncompliance with the promised increase.

Gonzalez testified that the installers discussed the agreement, which they wanted to include payment for the baffles at the new rate.

Gonzalez stated that he recalled that Olivo and Gene conversed around 9 a.m. on July 2. Gonzalez recalled that Olivo told Gene that he was firing the group because Gene had said that is what he had and either “we [the installers] wanted it or not.”⁴⁵ According to Gonzalez, Olivo said, “[I]f Gene was firing us, then to come and look for the truck.”

Gonzalez testified that he understands a little English and heard the conversation over the speaker phone; however, Olivo and Santos were translating for the benefit of the group. Accordingly, while he only understood some of what Gene said, he completely understood Olivo’s part of the conversation indicating to him that the installers were fired. Gonzalez volunteered that personally the 8-cent rate was okay, but he thought he should be paid for the baffles, preparation, and heights.

Gonzalez stated that he did not receive a discharge letter from the Company. According to Gonzalez, he discovered that

stated that for some jobs in June, the workers were paid for baffles. (Tr. 303–304.)

⁴⁰ Rosario identified his signature on the sign-in list (GC Exh. 2) and noted that he observed other employees sign.

⁴¹ Rosario stated that at the time he really did not know Gene and had only met him for the first time at a meeting the week before the hearing in Trenton, New Jersey. Rosario said that he does not speak English and could not have conversed with him. Rosario further volunteered that Santos and Olivo were explaining (translating) the many matters brought up in the conversation with Gene, who after a time did not want to speak with Santos.

⁴² In response to my question, Rosario, as I understood his translated testimony, said that the 8-cent rate was okay with the workers but the baffles and caulking were not reflected in the rate. According to Rosario, Santos and Olivo were under the previous impression gained from Gene that the baffles and caulking were to be included in the 8-cent rate. However, they were not being included and in the July 2 conversation, Santos asked Gene to include them in the materials rate.

⁴³ Odalis Gonzalez stated a number of his relatives work for the Respondent to include Jairo, a cousin, and two other brothers, Dioni and Agelis. He identified Jairo, Anbiory, and Dioni as attendees. Agelis was also a member of Anbiory’s crew. According to Odalis, he provided a letter from the treating hospital to his brother, Dioni, to give to the Company informing management of his injury and his incapacitation for an anticipated 6 weeks from June 25. Odalis was not sure that Dioni gave the letter to management, but he himself called to inform the Company of his injury.

⁴⁴ Gonzalez explained that what he meant by the Company’s non-compliance was that management stated that it was going to pay the increased rate, but it appeared that in some jobs they paid at different rates. According to Odalis, there were discrepancies in not only different jobs but on the same job.

⁴⁵ On cross-examination, Gonzalez conceded that Gene was told by Olivo (or Santos) that the employees *wanted* to get paid at the 8-cent per square foot rate for the baffles, plus preparation and height, and that Gene responded, “This is what I have.” Gonzalez took this to mean do you want it or not, do you want to come to work for that rate or not. Gonzalez, however, noted that neither Santos nor Olivo told Gene that he *should* (as a condition of their returning to work) pay them 8 cents per square foot, plus baffles, plus preparation and height. (Tr. 323–324.)

he was no longer employed by the Company when he called Sharon Perez, the company secretary, around July 25, 2008, seeking information for his medical insurance claim and was told by her that he no longer worked for the Company. According to Gonzalez, Perez would not provide him the information he sought.

C. The Respondent's Witnesses

Gene Hebding testified that he has been employed by Coastal Insulation for about 32 years and currently serves as an account manager; however, during year 2008, he was a production manager. Gene stated that as production manager he was in charge of all field supervisors and the insulation installers performing work for Coastal. As to the installers, his duties included scheduling their jobs and ensuring that all work was completed timely and well. Gene stated he possessed hire/fire authority with respect to the installers as well.⁴⁶

Gene said that the duties and responsibilities of the installers included reporting for work by 8 a.m. daily and reporting to their supervisors—the field supervisor—by 3:30 p.m. daily regarding the status of their jobs, which the Company expected as a general matter to be completed within 1 day. Gene noted that generally he scheduled the installers' next work assignment based on the 3:30 p.m. status call and if the job was completed he would e-mail or fax the next day's work schedule to the crew leader by around 6–6:30 p.m.

Gene noted that not all installers reported for their assignments by 8 a.m. because on occasion there were traffic issues, oversleeping, and ill installers, and other matters that prompted a later start. He also noted that on occasion a job might be completed on the second day and an installer might be assigned a second assignment on that day and report at noon. He stated that the Company's expectation was generally that all installers were to report for their assignments by 8 a.m. Gene added that as long as the installer called in to his field supervisor and advised him that he was sick, going to be late, or otherwise held up, the Company viewed the failure to report at 8 a.m. as acceptable.⁴⁷

Gene stated that (in 2008) installers were organized into crews, with one installer assigned as crew leader who was provided a company vehicle, tools, and a Nextel (walkie-talkie) as well as a company issued fax machine. He noted that all installers were not paid by the hour but essentially by the square foot of insulation used on the job. Gene stated that prior to June 2008, installers were paid 6 cents per square foot of insu-

lation material as well as the baffles, along with extra pay for preparation work for the site and heights over 9 feet; occasionally, but not often where the job required an extremely long distance, Gene said he in his discretion would pay the installers extra pay.

In the spring of 2008, Gene testified that Coastal's upper management, including John Achille, decided to implement a change in the installers' pay rate with a view toward giving them a fairer compensation scheme. Accordingly, the managers decided to increase the piece-rate from 6 to 8 cents per square foot but the installers would no longer be paid for height and baffles; however, they would continue to be paid for extra site preparation. According to Gene, the change was to take place on June 1. However, management at the time agreed that any job entered on the books before June 1 would be paid at the old rate and with the associated extras; any job after June 1 would be paid at the new rate. Gene stated that the changes were communicated to the employees through their respective field supervisors.

Gene admitted that he and his brother, Field Supervisor Ricky Hebding, received several complaints about the new pay system from Santos and Olivo; that Ricky also received complaints from the other installers.⁴⁸ Gene stated that some of the complaints related to the Company's nonpayment for the baffles; other complaints related to payments at 6 cents for some jobs and at 8 cents for other jobs.

Gene stated that he took some of the complaints directly from the workers, most notably Santos whose main complaint centered on the baffles and the Company's decision not to pay for them. Gene testified that he told Santos that the 2 cents extra was designed to offset this in attempt to make the pay system less subjective regarding the extra labor issue. Gene explained that extra labor was often determined by the account manager (as opposed to the production manager) who surveyed the job in question and decided, for instance, that extra labor would be paid for installation of insulation in a home with a cathedral ceiling. According to Gene, the new scheme sought to eliminate this type of subjective assignment of the material and labor costs for a given job.

Gene also recalled receiving complaints from Olivo who told him that he had received only 6 cents with no extra labor for a couple of jobs that took place after June 1. According to Gene, he told Olivo that the job was booked before June 1, so was paid at 6 cents. Gene conceded that Olivo was not pleased with his explanation.⁴⁹

Turning to July 2, Gene testified that Ricky informed him about 9 a.m. that two installers, Santos and Rafael Sanchez,

⁴⁶ The Respondent admits that during all material times Gene Hebding was in his capacity as production manager a supervisor and/or agent within the meaning of Sec. 2(11) and (13), respectively, of the Act. Hebding's own description of his duties and responsibilities, as well as the record evidence as a whole, fully establishes his statutory role as a supervisor and/or agent, and I would so find and conclude. In 2008, according to Gene, there were two Coastal production managers, he and Jorge Clayton.

⁴⁷ I note at this juncture that the Respondent did not produce any documentation of discipline of any installers for lateness, and the record is otherwise devoid of any discipline issued to any of the affected employees for lateness. It would seem that there was considerable flexibility in the installers' work schedule.

⁴⁸ I note that the Respondent evidently did not reduce either its old or certainly the new pay scheme to writing, either in English or Spanish, and distribute it in written form to the installers. The Respondent did not produce any such written documentation at the hearing.

It is further noteworthy that neither Gene nor Ricky Hebding spoke Spanish with any degree of fluency. Also, on cross-examination, Gene could only say that he believed the "message" about the new pay scheme went out to the installers; he could not be sure. (Tr. 468–469.)

⁴⁹ Gene did not explain how, if at all, he dealt with or resolved Olivo's complaint that he had received no pay for extra labor while being paid at the 6-cent rate.

assigned to a job in Franklin Township did not show up for work, that Ricky had tried to reach them but was unsuccessful. Gene stated that he also tried unsuccessfully to reach them on his Nextel.⁵⁰ Then, another field supervisor in South Jersey called and informed him that the assigned crew there had not shown up either. According to Gene, in both cases Ricky apologized to the job superintendent; and at least for the South Jersey job, he was able to get a replacement crew in place.

Gene said that he received a call from Santos at about 11 a.m., but only briefly spoke to him before speaking with Olivo more at length. Gene admitted that at this time he was kind of aggravated because three or four customers were irate over the no-show of the crews, and the Company's own account managers were equally upset.⁵¹ Gene conceded that both he and Santos were upset and angry and raised their voices while arguing back and forth. Gene candidly stated that in this emotional state, he questioned Santos' decision not to go to work and why he did not call to say he was not reporting to the job. According to Gene, Santos was trying to explain, but raising his voice also. Gene stated that he and Santos were getting nowhere,⁵² so he asked to speak to Olivo.

According to Gene, Olivo told him that he was speaking for everyone at the meeting and there were perhaps 20 employees, some from Sealrite, some from Elmsford, and quite a few from Coastal. Gene testified that Olivo said the employees were not happy with the new pay rate. Gene stated he tried to explain how the new rate operated but he had no authority to change it. Gene stated that he also told Olivo that he was not happy about their not showing up for work that day, but they were still welcome to work that day. Gene said that the workers could have reported at 11 a.m., 12 noon, or as late as 1 p.m., and that this would have been acceptable to him. Gene said he even told Olivo that the employees could come back to work the next day—July 3—but he needed to know what their decision was by 5 p.m. on July 2. Gene emphasized to Olivo (and the group), however, that he could not change the rate.

According to Gene, Olivo responded by saying, "You're firing me in that case, you're firing us." Gene testified that he told Olivo that he was not firing anyone, that they could come back to work, but he could not change the rate. According to Gene, since Olivo claimed to be speaking for the group, he asked Olivo to put the guys on the phone so he could speak to them individually and each could make his own decision, or they could call him personally if they were willing to continue working.

⁵⁰ According to Hebding, one cannot leave messages on Nextel phones.

⁵¹ Gene added that at this time the economy was slowing and builders were themselves under great pressure to complete their projects.

⁵² Gene volunteered that he and the installers, very good and long-term employees in his estimate, on prior occasions discussed work issues like gentlemen; problems were raised and employees were invited to the office to resolve them. According to Gene, even when an employee did not come to work, the employee would explain his absence, apologize for not calling, and all would be well. Gene stated that he could recall no occasion before the July 2 meeting when an employee, let alone a group of employees, did not show up or not contact him because they just did not want to work.

Gene testified he was not sure if Olivo communicated his offer to the employees.⁵³ Gene stated that the conversation lasted about 10–15 minutes and at the end he told Olivo if he (they) no longer wanted work, it was Olivo's responsibility to return the trucks. However, according to Gene, Olivo told him, "If you are firing me, then you pick up the trucks," to which Gene said once more that he was not firing them, but he needed an answer from them by 5 p.m. that day so he could schedule work for the next day.

Gene testified that after about 5 p.m. on July 2, John Achille convened a meeting of the managers to deal with the retrieval of the company vehicles since the installers had not responded to Gene's offer. According to Gene, Achille was concerned about the July 4 holiday coming up and did not want the trucks unattended; so a group of managers, including him, rode together around 5:30–6 p.m. in the vehicle of the Elmsford production manager, Wilson Torres, to begin the retrieval of the company vehicles which were all located in Paterson within a few blocks of each other.

Gene stated that he, along with Torres, personally picked up Frederico DeLeon's vehicle. According to Gene, Torres told DeLeon (in Spanish) why they were picking up his truck, that is none (of the installers) had called about returning to work, so it was assumed no one wanted to work for the Company.⁵⁴ Gene also recalled that installer Sandy Genao was present at the time and Genao reminded him that he was going on vacation the next day and was planning to return his truck that afternoon.⁵⁵ Gene stated that he told Genao that he was there to pick up all the trucks so he would take his as well. However, Gene testified that he could not recall whether Genao was fired and stated that he did not send a termination letter to him.

Gene testified that while he received about three to four calls from employees regarding the pay issues, he could not recall if Sharon Perez had received complaints from the Spanish-speaking employees as she did not advise him. Gene stated that he also could not recall how many complaint calls Ricky may have received. Moreover, Gene said that he did not alert the Company's accounting department (John Achille) about the specific pay issues, and actually did not speak to anyone in upper management about the complaints with the possible exception of conversations with Achille about the pay rate change itself. Gene noted that he was in charge of the installer payroll and essentially felt no need to consult with other managers

⁵³ Gene admitted that he then knew the people gathered at the meeting could not speak English. Gene stated that in the past, under such circumstances, he would have had them call Sharon Perez whom he had employed to deal with the language issues with installers who might need help, such as directions to a worksite.

⁵⁴ It should be noted that neither Torres nor DeLeon testified at the hearing. Gene acknowledged that DeLeon spoke only Spanish. Gene said that Torres told him what he told DeLeon.

⁵⁵ Gene stated that Genao told him that although he told Ricky about the meeting at around 8 a.m. on July 2, he had no knowledge of the purpose of the July 2 meeting and he had spoken to Ricky weeks before about his vacation plans. Gene said that he told Genao that he knew of his vacation plans. Gene noted that Genao did not work on July 2, but returned to work in about mid-August 2008. Gene admitted that Genao filed out a new application upon his return.

about the specific issues. Gene noted on cross-examination that the pay issues were discussed in his conversations with Santos and Olivo on July 2.

Gene testified that on July 2, after being informed by Ricky that the employees had not shown up for work, he called Achille (and other managers as well) after 8 a.m., sometime after Ricky had called, and met with him later and the other managers at around 5 p.m.⁵⁶ Gene could not recall meeting with Achille, fellow production manager Jorge Clayton, another executive, John Herring, Wilson Torres, or other Coastal executives at 1 p.m.

Gene testified that the fact that the employees met on July 2 had nothing to do with their separation from the Company. As far as he was concerned, by not responding to his offer to return to work by 5 p.m. on July 2, he considered the installers as having abandoned their jobs and were voluntarily quitting. In short, they no longer wanted to work for the Company.⁵⁷

Richard "Ricky" Hebding testified that he has been employed by Coastal for about 27 years. In July 2008, he held the position of field supervisor whose main duties were to check on the various insulation installation jobs to ensure a problem-free completion. Ricky stated that as field supervisor he possessed hire/fire authority regarding the installers assigned to him, and part of his duties included assigning—usually by fax—work assignments to crew leaders such as Santos, Olivo, and Nieves.⁵⁸

Ricky testified that in the spring of 2008, the Company paid installers 6 cents per square foot (of material) and extra money for height work, site preparation, and baffles. However, during this time, the Company decided to do away with payments for extra labor as well as baffle installation, but increase the amount paid for material to 8 cents per square foot.

Ricky stated that he (verbally) conveyed the wage change to Santos, Olivo, Anbiory Gonzalez, and Nieves, the installers who were more fluent in English, and they were to tell the other non-English speaking installers about the change.

Ricky noted that he was told by management that new jobs

would be entered into the computer system under the revised pay system; jobs that were entered under the old pay scale would be paid at the 6-cent rate with extra labor until such jobs were completed. According to Ricky, the installers were told of this at the time the new pay system was implemented. Ricky acknowledged that the installers complained to him about the new system, claiming that they were being paid less under the new system because of the exclusion of pay for the baffles. According to Ricky, their complaints centered on the exclusion of the baffles. He stated that Santos, Olivo, and Nieves complained to him, stating that the straight 8-cent rate produced less money for them because it did not account for (crawl) space installations, straight footage on the walls, and heights over the 8-foot standard wall. Ricky said he tried to explain to them that the new rate more than balanced out the exclusion for those items. However, the three responded that his explanation was unacceptable—ridiculous in fact; the installers believed they were being "screwed." Ricky said that he continued to try to convince the installers that over the next few months they would see that they made out better under the new wage plan.

Ricky acknowledged that he knew of a few on-the-job incidents where pay errors were detected but these were handled by Gene. He noted that Santos and Olivo had complained to him that they were getting paid at both the 6-cent and 8-cent rates on certain projects. Ricky believed that Gene spoke to them about this after he advised his brother of the problem. Ricky noted that he could recall only two problems of this type prior to July 2, and believed they were resolved. Ricky denied that he put the employees' complaints off with excuses such as computer glitches or other explanations. Ricky stated he told the workers that he would investigate their complaints, usually through Gene.

Turning to July 2, Ricky testified that he went to a jobsite to meet with Santos and Rafael Sanchez and discovered that they were not there. Ricky said that he tried to call them and Olivo as well, but was unsuccessful; he was finally able to reach Genao.

According to Ricky, Genao told him that he had been called that morning and told that the installers were meeting at Olivo's house but that he did not know precisely what the meeting was about, and that he intended to come to work after the meeting.⁵⁹ Genao also told him that all of the guys at Olivo's house were probably not working that day.

Ricky testified that he called his brother, Gene, and told him that all of the guys were meeting at Olivo's house. According to Ricky, Gene asked how many installers were there and he told him at least all of his (Coastal) guys; because no one had shown up for his jobs.⁶⁰

Gene also asked what the meeting was about, and Ricky stated he told him that it probably had something to do with the

⁵⁶ I queried Gene about his contacts with management about the July 2 incident. Gene, noting the installers' failure to report caused a lot of upset with management, recalled possibly speaking with Achille between 9 and 11 a.m. about the issue. Gene was sure he spoke to Achille around 11:15 or 11:30 a.m., after his conversation with Olivo ended, because Achille is his supervisor who needed to know what was happening. (Tr. 469-470.)

⁵⁷ Gene acknowledged that he had worked out a resolution of job-related issues with basically the same group of Coastal installers in 2007. However, in that case, he noted that there was no disruption to the Company's operations or service to the customers because he knew of the installers' concerns ahead of time and, thusly, all the job assignments were covered.

⁵⁸ Gene testified that field supervisors possessed hire/fire authority, could suspend workers, or issue (disciplinary) warnings and basically were authorized to do whatever kind of action they felt necessary (Tr. 441) without consulting him. (Tr. 450.) Gene added that pay discrepancies were usually first brought to the attention of the field supervisors.

Ricky added that Santos' crew member was Rafael Sanchez; Olivo's was Samuel Figaro, and Ramon Fermin; and Nieves' was Frederico DeLeon.

⁵⁹ Ricky stated that Genao also reminded him that he was scheduled for vacation to commence that weekend.

⁶⁰ On cross-examination, Ricky acknowledged that Olivo, Sanchez, Nieves, DeLeon, Anbiory and Odalis Gonzalez, Santos, and of course Olivo, pretty much his whole crew, were at the meeting. Ricky stated that he told Gene the Sealrite crew members were there also.

pay; the installers were not happy about the pay rates.⁶¹

According to Ricky, Gene told him that he (Ricky) had to get the jobs covered and he did. Ricky said that the next thing he knew, Gene called later to say the Company was going to pick up the trucks later in the evening.

Ricky testified that he spoke to Santos (and possibly Olivo) after the meeting, around noon that day, and asked him out of curiosity what was going on and were the installers coming to work. According to Ricky, Santos told him he was not sure, but would be consulting the Board.

Ricky noted that Santos did not say that he had been terminated by Gene but said that he was not sure he had been fired. Ricky testified that he told Santos that he did not know for sure, but did not believe he had been terminated.

Ricky noted that Santos said that all of the Sealrite and all of Ricky's crew met because they were not happy with the pay, they felt they were being shorted—and specifically disliked not getting paid for the baffles. Ricky said that he spoke to Gene after this conversation and told him what the installers' complaints were about.

Ricky acknowledged that after July 2, neither he nor Gene sent work to the installers; Ricky stated that in particular he was given no work to assign his installers.

Manuel Luna (Manuel) testified that he currently works for Elmsford and was working for the Company during May and June 2008. Luna stated that he, however, was visiting his home country, Santo Domingo, from June 27 through July 14, 2008. Manuel noted that his brother is Rober Luna, whom he trusts "100% because he is in charge of everything of mine." (Tr. 543.)

Manuel testified that he did not know of a meeting at Olivo's house on July 2, 2008, and only found out about it after his return to the United States.⁶² Manuel also stated that he did not speak with his brother either before leaving for Santo Domingo or while he was there.

Juan Rober Luna (Rober) testified that he is Manuel's brother and, like him, is currently employed by Elmsford. Rober stated that he was employed at Elmsford on July 2, 2008, but did not attend the meeting at Olivo's house.

According to Rober, Honoret called him on July 2 and informed him that they (a group of installers) were going to meet and make some "demanding" (his word) about the baffles. Rober stated that the installers were getting paid 6 cents and they were going to pay 8 cents (for the material).⁶³ According

to Rober, Honoret asked him if he could add his name to the sign-in list. Rober testified that he told him no, that he was not "in that problem" and did not want to be included. (Tr. 552.)⁶⁴ For his part, Rober stated that he understood that the 8-cent rate did not include the baffles.

Rober said that he spoke to Honoret before the meeting and that Honoret told him the group was meeting to talk about the baffles. Rober said that Honoret, a friend, told him not to attend the meeting because Rober was trying to bring his wife to the United States. Rober admitted that in that light he was fearful of the consequences of attending the meeting.⁶⁵

Rober also said that he spoke to Honoret later on July 2 and, while he could not recall the results of the meeting, he noted that Honoret did not say that he had been fired.

Fedham Gonzalez testified that he currently works for Elmsford Insulation and was employed there on July 2, 2008, but did not actually work that day.

Fedham explained that on July 2, he had made plans to go to work in New York on a Brooklyn job with his father, with whom he regularly works and who drives the company vehicle. Fedham said that on that day his father picked him up but instead drove to New Jersey and on the way he discovered that his coworkers were concerned about not being paid properly under the new wage system. Fedham stated that his party met at a Coastal worker's home—he could not recall his name—and recalled seeing a number of installers.⁶⁶

Fedham related that at the meeting, points were raised to fix the method by which installers were paid; he recalled that the wage rate changed from 6 to 8 cents—6 cents with extras and 8 cents without extras. However, according to Fedham, the Company was paying 6 cents without paying for the extras and nothing for the baffles.

Fedham recalled that Santos called Coastal management and was speaking aloud to the assembled group to someone on the other end. Fedham noted that he could hear what Santos was saying (interpreting) but not what the other person was saying. Fedham stated that Santos told the other about the pay issues, but then they got "hyper" (his word) and the next thing the other person said to bring the vans back to the Company or they were going to pick them up. Fedham testified that he understood the person speaking with Santos to say because we were worried about the pay, then in conclusion they (the installers)

On cross-examination, Rober stated that employees believed basically the Company's 8-cent rate, including the exclusion of the baffles, resulted in a pay cut.

⁶⁴ Shown GC Exh. 2, Rober stated that he did not ask (or permit) anyone to sign his name. Notably, Rober was not issued a termination letter.

⁶⁵ I would note that Rober's credibility was placed in doubt by his testimony regarding his concerns that perhaps his family's ability to come to this country would be compromised by testifying in support of the installers. I am not inclined to credit his testimony, especially in terms of his disavowal of giving Honoret permission to add his name to the list. It seems both Rober and Manuel worked out their own deal to keep their jobs.

⁶⁶ Gonzalez recalled that he specifically saw Jorge Luis (Jimenez), Epifanio Rosario, Victor (Honoret), and Cesar Cardenas at the July 2 meeting; he could not recall the names of the others.

⁶¹ On cross-examination, Ricky said that between June 1 and July 2, crew leaders Santos, Anbiory Gonzalez, Olivo, and Nieves complained "5 nights a week" about not getting paid enough for the work they performed under the new pay system.

⁶² Manuel was shown (GC Exh. 2) the sign-in sheet and testified that the signature there was not his, nor did he authorize anyone to put his name on the list. It should be noted that Manuel was not issued a termination letter.

⁶³ I am not entirely clear as to what Rober was saying here, based on his translated testimony. I think he was trying to say that the installers had been paid 6 cents for the baffles under the old system and were on July 2 seeking 8 cents, as they were "material" like the sheet insulation.

were not going to work, and they (the Company) were going to take the vans. (Tr. 559). According to Fedham, the installers did not want to work for the pay rate Coastal was paying.⁶⁷

Fedham recalled that Victor Honoret spoke by phone to Wilson Torres, and Torres asked who was on the list (sign-in) from Elmsford and then said everyone on the list is not going to work. (Tr. 561.)

On cross-examination, Fedham disclosed that he returned to work at Elmsford about 2 months after the July 2 meeting, working once more on his father's crew.⁶⁸ He noted, however, that between July 2 and his return to work, he received no work orders from the Company.

Sandy Genao testified that he currently works for Coastal as an installer of insulation. Genao stated that although he was scheduled to work on July 2, he attended the meeting of the installers. Accordingly, he did not report at 7 or 8 a.m. as required for his assignment that day.⁶⁹ According to Genao, the purpose of the meeting at Olivo's house was to discuss jobs for which we were not getting paid or not being paid as the Company promised, and that he was told more or less about these purposes before attending the meeting.

Genao stated that he planned to go to work after the meeting and actually called Ricky to tell him he would be late. Genao recalled being at the meeting when Gene and Olivo were talking, but could not recall whether the conversation was broadcast on the speakerphone and could not recall what Gene said. Moreover, Genao could not recall hearing the conversation because they were the ones representing everybody.⁷⁰

Genao acknowledged that he dialed up Gene on his cell phone since he had Gene's number and that Santos' conversation with Gene was made on his phone. Genao said that while he understands English a little, Olivo and Santos translated

Gene's conversation and they told the group that "we had lost our jobs."

Genao could recall that at some point Gene said return the vans and Gene later did pick up his vehicle at around 7 p.m. However, according to Genao, he told Gene that when he returned from his vacation, he wanted the van returned to him. Genao also volunteered that he told Gene at that time there were many employees like him who wanted their jobs back. (Tr. 421.)

Genao stated he did not believe he was terminated on July 2 and, in fact, believed all of the installers were coming back to work based on Gene's asking him who was returning to work. Genao also stated that he could not recall any employee attending the July 2 meeting say that he was quitting; they simply did not go to work that day.

Genao noted that when he returned from vacation in August he had to fill out a new application, as did his cousin, Ramon Fermin, who also wanted to return to work. Genao stated that at the time he met with Gene and told him that he was not part of the work stoppage. However, according to Genao, Gene told him that his name appeared on the Board's complaint and that he should remove himself from the list. Genao stated that he told Gene that he was already out (of favor) with the installers because he was working. However, Genao stated he later called the Board agent and asked to be removed (from the suit) because he believed the employees lost their right to be employed by the Company.⁷¹

Hugo Tavaréz testified that he was currently employed by Elmsford Insulation which included Coastal, and as he described the Respondent's business, "the whole corporate." Tavaréz stated that he has worked for Elmsford since around late 1998, starting first as an installer for about 3-4 years, then to field supervisor, and now production manager—the position he also held in July 2008.

Tavaréz stated that he knew Wilson Torres from years past because Torres was a production manager to whom he reported when he was a field supervisor. However, in July 2008, he and Torres were both production managers. Tavaréz recalled that Torres supervised installers Rafael Sanchez and Jose Batista.

Tavaréz stated that he was told by the Company about the wage change, but was not exactly sure of the time frame for its implementation.⁷² However, Tavaréz believed it occurred in the summer of 2008 and was sure that he spoke individually to every one of the 28 installers under his supervision about the change. Tavaréz noted that the installers actually asked him to explain the change because admittedly some workers were confused about the matter. Tavaréz volunteered that there were

⁶⁷ Actually, Fedham's response here was to a leading question posed by the Respondent's counsel, and Fedham's response was, "Exactly. Because the work until that point was fixed." (Tr. 559.) In my view, this answer was not responsive to counsel's question and no follow-up question was posed by counsel. Therefore, I will not credit this response to the extent that the witness was saying that the installers as a group or individually did not want to work at the 8-cent rate.

⁶⁸ Fedham acknowledged that when he returned to work, he was not required to fill out a new employment application or submit additional immigration or other documentation. Fedham also volunteered that during the nearly 2-month hiatus, his father was visiting Santo Domingo. I note that while Fedham signed the sign-list, he did not receive a termination letter from the Respondent.

⁶⁹ Genao testified that the installers were supposed to start working at 7 or 8 a.m. because the builders were anxious for them to start; they did not want to be held up or wait for the installers. Genao did not say where he was scheduled to work on July 2. The Respondent also adduced no documentation of his work assignment for July 2. On cross-examination, Genao stated that, ultimately, he did not work on July 2 because the meeting took up the day. Genao also noted he was going to go on vacation the next day and planned to return the van to the Company later that day.

⁷⁰ Genao's testimony in this regard was not only unresponsive, but practically incomprehensible. Asked by the Respondent's counsel whether he heard anything that Gene said, Genao answered "I don't recall." Asked by the Respondent's counsel, "Did you ever hear Gene say that anyone was fired?" Genao answered, "I don't know. I think that he left that message with Sergio [Santos]." (Tr. 417.)

⁷¹ I did not find Genao's testimony to be particularly persuasive. It seems clear that he worked out a separate handling of the protest for his own protection and continued employment. I note that even he, in spite of his testimony, was sent a termination letter by Gene who testified earlier that this was a mistake.

⁷² Tavaréz also could not recall the exact date he was promoted to production manager but believed this occurred in the context of his return to the Company from a short stint at another company in Buffalo, New York, in April 2008. Tavaréz noted that upon his rehire with the Respondent, he did not have to fill out a new application or submit other documentation such as W-4s.

complaints and constant questions from some installers, but he continued trying to explain the new system.

Tavarez stated that all installers should be on the job by no later than 8 a.m. because the builders and company account managers will complain to upper management. Accordingly, installers are supposed to contact their field supervisor in the morning and in the afternoon; and failing that, the field supervisor would call them. For instance, he noted that the morning calls were required to forestall or deal with access to the job issues or work ticket problems; the afternoon call was basically a status check to determine if the job was completed so that the work schedule for the next day could be made.

Tavarez recalled that on July 2, Torres called him and asked him to pick up the Company's trucks assigned to Honoret and Jimenez. Tavarez stated that he picked up Honoret's truck on July 2 in the Bronx. However, Jimenez' truck was not returned until July 3 because the parking lot attendant would not release it to them on July 2; Rafael Sanchez' truck also was picked up a few days after July 2.⁷³

On cross-examination, Tavarez testified that he asked Torres why the trucks were being picked up, but Torres did not explain at the time; Torres did not give him much information. However, Tavarez said that probably the next day Torres told him the guys were fired. (Tr. 536.)

Tavarez noted in passing that in spite of the complaints and questions, "no one on his side"⁷⁴ ever threatened to quit because of the wage change.

John Achille, an admitted supervisor/agent, testified and stated that he serves as a vice president of Coastal whose duties and responsibilities include managing the office clerical staff, the accounts, production, and warehouse departments of the Company; Achille said he reports to Steven Schwartz, the president. Achille stated he essentially oversees daily the functions and operations of these departments and assists in making decisions regarding same, but had no direct role in terms of assigning work to the installers. According to Achille, this latter function was assigned to the production manager.⁷⁵ Achille stated the next level of supervisors for the installers are the field supervisors.⁷⁶

Achille, however, stated that he is responsible for and familiar with accounting for the numbers associated with Coastal's work force—the installer in particular. Along these lines, Achille testified that Sandy Genao is currently employed as an

installer and was not terminated on July 2, 2008; Rober Luna and Manuel Luna are currently employed as installers; Fedham Gonzalez is also currently employed; however, Odalis Gonzalez quit his job on July 7, 2008. Achille also noted that Jose Batista continued to work for the Company after July 2, but quit on July 11, 2008. Likewise, according to Achille, Rafael Sanchez worked after July 2 for Elmsford but refused to work on or about July 14, 2008.⁷⁷

Achille stated that he was familiar with the events of July 2, 2008. According to Achille, Gene told him that a number of installers had not shown up for work on that day, and he discussed the issue with Gene and attempted to identify those workers who had not reported to work in order to service the affected customers and (in his words) try to salvage the balance of the day. Achille stated that he also spoke with Ricky about the matter since a majority of those not reporting were his men.

Achille noted that at the time of these discussions, he was not in the office so, upon his arrival there, he convened a meeting around 1 p.m. with his managers to discuss the situation and ascertain which jobs in particular were affected; the meeting was attended by Jorge Clayton, Gene Hebding, John Herring, and Wilson Torres.

On cross-examination, Achille testified that Gene had told him around 11 a.m. on July 2 that a group of almost 20 installers had not shown up for work and were having a meeting. Achille stated that he could not recall whether Gene mentioned anything about the substance of the employee meeting. According to Achille, Gene told him that Ricky had informed him just that there were some guys meeting. (Tr. 381.) Achille stated he received all of the information about the meeting from Gene who did not tell him precisely or specifically why the 20 workers were not reporting to work, and he did not ask him. Achille noted, however, he was upset because the customers were not served and the customers were also upset. (Tr. 405.) Achille stated that basically whatever happened at the meeting happened with Gene and he merely reacted to Gene's telling him that the workers did not show up, leaving customers unserved, his main concern.⁷⁸

Achille stated that the management meeting lasted about 15–20 minutes, and Gene said that he had spoken with Santos and Olivo and that Ricky had also spoken to some of the installers. However, Achille said that he could not recall what Gene (or Ricky) might have said to the employees regarding their com-

⁷³ Tavarez stated he was not instructed to pick up the vehicle assigned to installer Jose Batista on July 2. According to Tavarez, Batista worked for a time after July 2, but quit. Tavarez said he picked up Batista's truck about 2 months later. Tavarez said that Sanchez also worked after July 2, but also quit at some point.

⁷⁴ I interpreted this to mean, none of the 28 installers Tavarez said he supervised.

⁷⁵ Achille identified Wilson Torres, Hugo Tavarez, Jorge Clayton, and Gene Hebding as the production managers employed by the Company during the summer of 2008.

⁷⁶ Achille identified the field supervisors employed as such in the summer of 2008 as follows: Ricky Hebding, Ritchie Le Cant, Dave Carter (Coastal); Keith Corrine (Sealrite); and Pete Teniery, Jose Fuentes (Elmsford). Achille stated that the field supervisors report to the production managers.

⁷⁷ Achille identified the employment status of these individuals by referring to GC Exh. 2, the sign-in sheet, and GC Exh. 13(c), Odalis Gonzalez' personnel action sheet, and evidently from his memory.

⁷⁸ I am not persuaded by Achille's denial here and later in his testimony regarding what he was or was not told by Gene about the employees' reasons for meeting, and particularly not showing up for work. Achille impressed me as very intelligent and dutiful. It is hard for me to imagine a man of his position and maturity not at least asking Gene why 20 of the 120 installers employed by the Respondent did not report for work on July 2. It also was difficult for me to credit Gene's testimony that he at no time told Achille of the ongoing pay issues with the Dominican group. Both of these men did not appear to me to be inclined to such remissness in the conduct of the Respondent's business. In short, I do not believe that Achille was totally honest in this aspect of his testimony.

plaints. Achille noted that the managers were waiting for the employees to contact the Company, and further noted that Gene had not told him that he had fired the workers.

Achille stated that the installers were unresponsive to Gene's attempt to reach out to the workers, and he began to feel uncomfortable about the security of the company vehicles assigned to these workers. Achille testified that he made the decision to pick up the trucks—later in the day—but could not recall the time except that he had not made the decision by 3 p.m. (Tr. 388.) He noted that his concerns centered on security over the July 4 holiday for the company vehicles located at two locations in Paterson, New Jersey, and in (the Bronx) New York. According to Achille, the vehicles were picked up around 6 p.m. on July 2, and that it was important to retrieve them at that time because the cut-off time for scheduling of jobs for the next day is 5 p.m., as schedules are made after 6 p.m. the day before. According to Achille, it took a few hours to retrieve the vehicles but all of the vehicles were back at company headquarters by about 9 p.m. on July 2.

Achille testified that he assisted with the retrieval of the vehicles, along with Tavarez, Herring, Torres, Gene, Clayton, and Chris Unitus, another manager. Achille stated that he and Gene went to Genao's residence to pick up his truck and Gene spoke with Genao at the time. Achille said while he did not speak Spanish (according to Achille, of the managers, only Torres spoke Spanish) he could tell by Genao's body language that he was concerned about his job. Achille noted that Genao did not work on July 2 or 3, and he was not assigned work on either July 2 or 3.⁷⁹

Achille stated that by his having hire/fire authority, he authorized the letters of termination for the affected installers and sent them out on July 3 in the late afternoon. However, Achille said that while he did not author the letters, he did review them prior to sending them out.⁸⁰

IV. THE CONTENTIONS OF THE PARTIES

A. *The General Counsel's Position*

The General Counsel contends that it is undisputed that the installers met at Olivo's home on July 2 to discuss essentially the Respondent's failure, as they viewed things, to fairly and properly compensate them under its newly instituted flat-rate pay system.

The General Counsel argues that is equally undisputed that during the course of the meeting, Santos and Olivo telephoned both Gene and Ricky Hebding to inform them on behalf of the gathered installers of the meeting, and its general purpose to correct pay irregularities and receive proper compensation under the Respondent's pay scheme. The General Counsel sub-

mits that under applicable Board law, the employees' July 2 meeting was protected under the Act.

The General Counsel further asserts that the installers gathered at the meeting—whose identities were known by management, namely, Gene and Ricky and another supervisor, Wilson Torres—were terminated by the Respondent because they had engaged in protected concerted activity. The General Counsel submits that Santos and Olivo, speaking and translating for the concerns of the group, at no time stated that they were quitting and fully intended to go to work that day, assuming, of course, they were scheduled to do so. The General Counsel notes that not only does the text of the Respondent's termination letter establish a discriminatory nexus between the discharge and the installers' protected activity, but so does the abrupt and swift discharge of a fairly substantial portion of the Respondent's work force establish both a nexus and a discriminatory motive. Essentially, the General Counsel submits that within hours of the meeting at which the installers expressed their concerns to both Hebdings and Gene's angry take-it or leave-it response, the Respondent took the first step to discharge the installers; that is, they picked up the company trucks and equipment. The discharge letters followed within a day's time on July 3. The General Counsel submits that there can be no doubt that the Respondent, under these circumstances, discharged the installers because they engaged in statutorily guaranteed protected activity.

Regarding the Respondent's asserted reasons for terminating the installers, the General Counsel submits that they are mere pretext and not supported by Board law. The General Counsel notes that employees seeking to assert their statutorily guaranteed rights—here a work stoppage to draft a petition protesting what they perceived were problems with the new system—do not have to obtain the permission of the employer before asserting them. The Act and Board law, the General Counsel notes, protects workers faced with perceived threats to their rights as employees. Accordingly, that the installers did not provide advance notice on July 2 does not remove them from the protection of the Act.

The General Counsel also contends by way of anticipation of the Respondent's defense that employees' protesting work conditions can protest by any legitimate means to include a strike, even if other lesser means could have been used to address their concerns.

Regarding the Respondent's defense (as stated in the termination letters) that the installers were fired because they abandoned, and wrongfully so, their jobs, the General Counsel asserts that the Respondent presented no evidence they had indeed abandoned any (assigned) jobs. Merely failing to appear at a jobsite that morning, the General Counsel contends, basically does not support a claim of job abandonment for all of the installers, especially considering the testimony that the installers had considerable discretion regarding report time and some had no work scheduled for either July 2 or 3. Moreover, based on the credible testimony of the installers, and even Gene, the workers in the July 2 conversation never threatened to quit or said that they were quitting. The General Counsel submits that the installers at no time abandoned their jobs and the Respondent's termination letter, stating that they had, was a

⁷⁹ Achille identified GC Exh. 14, Genao's employee set up, change, and termination authorization form, that Gene filled out which indicated that Genao was terminated for abandonment of his job and that his last day of work was July 2, 2008. Achille also recalled that Genao applied for unemployment benefits and that upon his return from vacation, he filled out a new employment application.

⁸⁰ Achille stated that Carol La Belle and Rich Fall at headquarters coauthored the letter, but that perhaps Gene and Torres both read it. Notably, Gene and Torres actually signed off on the letters.

mere pretext and cover for the unlawful discharge.

The General Counsel also contends that the installers did not engage in a partial or intermittent strike in order to cause purposefully irreparable damage to the Respondent's business, or to dictate their own terms of employment. Moreover, the Respondent presented no evidence to support such a claim. The General Counsel notes that the 22 installers here had no established grievance procedure to utilize for redress of their grievances, let alone any representatives to act on their behalf, save several outspoken crew leaders like Santos, Olivo, and Nieves. The General Counsel argues the employees had no other choice but to speak up for themselves as best they could, and in fact did so in the least damaging way to the Respondent's business—early in the morning of July 2 when the day's work could have been performed after the meeting. The General Counsel implies the Respondent's intemperate response to the installers' complaints caused whatever damage there was to the business.

The General Counsel notes on this score that it should be kept in mind that in spite of the many and repeated complaints from installers such as Santos, Olivo, and others about the irregularities in their pay and what clearly was their lack of understanding of its implementation and operation, the Respondent remained unresponsive. The General Counsel, in essence, asserts that the Respondent's unresponsive behavior forced the installers to stop work, such as they had in April 2007, to attempt to resolve the issues, to gain an audience with Gene, and come to some acceptable resolution of the pay issues, particularly the operation, application, and implementation of the new pay system.

The General Counsel finally notes that the Respondent, based on the termination letters, discharged workers participating in the meeting but who were not even scheduled to work that day, raising the specter that its defense is mere pretext and coverup for the real reason they were discharged—engaging in protected activity.

B. The Respondent's Position

The Respondent essentially argues that the installers, at-will employees all on July 2, 2008, engaged in a premeditated, malicious, and unlawful strike in a calculating attempt to dictate to the Company basic terms and conditions of employment and cause damage—causing customer dissatisfaction—to its business. The Respondent further contends that in spite of the installers' unlawful action, the Company offered them unconditionally the opportunity to return to their jobs either on the afternoon of July 2 or by July 3, 2008. However, this offer was certainly rejected by Olivo and Santos who essentially told the Company to pick up its vehicles, as well as the remaining installers who failed to respond to the Company's overtures.

The Respondent asserts that the General Counsel failed in his burden to demonstrate engagement in protected activity by the installers, and that the Respondent engaged in retaliatory behavior prohibited by the Act. The Respondent, conceding that the facts associated with this matter are hotly contested, contends, nonetheless, that the General Counsel's main witness (Santos) is not only incredible but was willfully false in contravention of his oath to tell the truth.

The Respondent argues that the most vocal of the company installers including the principal spokesmen, Olivo and Santos, were not willing to work for the Respondent's rate of pay and were not going to return to work unless there was an agreement between the parties, making this demand in spite of the undisputed fact that there was no contract of employment between them.

In short, the Respondent submits that the installers engaged in an economic strike; but the Respondent made an unconditional offer to them of immediate return to work without penalty; and the installers refused this offer. The Respondent contends given this scenario, it did not engage in unfair labor practices or retaliatory behavior on July 2 or at anytime thereafter by discharging the installers.

The Respondent notes that Santos, in a later conversation with Ricky Hebding, did not state that he had been fired but was going to the Board to discuss the matter. The Respondent also notes that it did not send out the termination letters until July 3, thus evidencing its conciliatory purpose of giving the installers every opportunity to come back to work.

On balance, the Respondent asserts that the installers were at-will employees who attempted to mandate and dictate the terms and conditions of their employment with Coastal. The installers had no basic right under Board law to take the actions they did on July 2. Accordingly, the Respondent contends the charges here should be dismissed.

V. APPLICABLE LEGAL PRINCIPLES

Section 7 of the Act (in pertinent part) provides that "[e]mployees shall have the right to self-organization, to form, join, or assist any labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities." Thus, in short, employees have the statutory right, in concert, to take action for better job conditions.

Section 8(a)(1) of the Act provides: "It shall be an unfair labor practice for an employer (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."⁸¹

As noted, Section 8(a)(1) also entitles employees to engage in concerted activities for their mutual aid and protection. In *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the Supreme Court affirmed that employees with no bargaining representative or established procedure for presenting their grievances may, nonetheless, take collective and concerted action to air their grievances regarding terms and conditions of employment. Employees are not required to give advance notice of their intention to take collective action where the failure to report to work was a concerted action for mutual aid and

⁸¹ In *CGLM, Inc.*, 350 NLRB 974, 979, (2008), the administrative law judge noted that the Act is concerned with concerted activity, not concerted thought. Accordingly, all participants in a group activity need not have identical reasons for engaging in the activity in question. Such differences in employee concerns do not render the activity individual as opposed to concerted. See also *Advance Cleaning Service*, 274 NLRB 942 (1985).

protection. *Lisanti Foods, Inc.*, 227 NLRB 898 (1977).

In this regard, the Board has determined that employees who discuss their wage rates engage in protected activity. *Fredericksburg Glass & Mirror*, 323 NLRB 165 (1997). More recently, the Board has held that employees who complained about favoritism, wages, and bonuses engaged in protected activity. *North Carolina License Plate Agency # 118*, 346 NLRB 293 (2006).

However, it is axiomatic under Board law that an employer is entitled to set the terms and conditions of employment of its work force. *Consolidated Diesel Co. v. NLRB*, 263 F.3d 345 (4th Cir. 2001); *TNT Logistics of America, Inc. v. NLRB*, 413 F.3d 402 (4th Cir. 2005). Accordingly, the Board has long and consistently held that partial and intermittent strikes (work stoppages) are denied the protection of the Act. *Vencare Ancillary Services v. NLRB*, 352 F.3d 318 (6th Cir. 2003).⁸²

The Board has defined concerted activity. When an employee acts with or on the authority of other employees, the employee is engaged in concerted activity. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), 281 NLRB 888 (1986) (*Meyers II*), cert. denied 487 U.S. 1205 (1988).

As noted in the recent case, *Ashville School, Inc.*,⁸³ in which the administrative law judge was upheld, the following summary of the Board's interpretation of concerted activity (taken from *Diva Ltd.*, 325 NLRB 822 (1998)) is instructive:

Since *Meyers* [*Meyers Industries (Meyers I)*], 268 NLRB 493 (1984), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board has found an individual employee's activities to be concerted when they grew out of prior group activity, when the employee acts formally or informal, on behalf of the group, or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected. However, the Board has long held that for conversations between employees to be found protected concerted activity, they must look toward group actions and that mere "gripping" is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3rd Cir. 1964), and its progeny. *Id.* at 830.

As the Board stated in *Holling Press, Inc.*, 343 NLRB 301 (2004):

In order for employee conduct to fall within the ambit of Section 7, it must be both concerted and engaged in for the purpose of "mutual aid or protection." These are related but separate elements that the General Counsel must establish in order to show a violation of Section 8(a)(1).

⁸² A partial strike is a concerted attempt by employees, while remaining at work, to bring economic pressure to bear on their employer, as by refusing to work overtime, engaging in a slowdown, or accepting some tasks and refusing to perform others. An intermittent strike is a series of concerted refusals to work during a short interval, followed by a resumption of work. See, *The Developing Labor Law*, Fourth Edition, Chapter 6, III, C, 2. Notably, Sec. 13 of the Act provides that nothing in the Act shall be construed so as to either interfere with or impede or diminish in any way the right to strike.

⁸³ 347 NLRB 877 (2006).

Accordingly, employees who simply pursue a personal claim, even with the assistance of other employees, may not be extended the protection of the Act under *Holling Press, Inc.*, supra. In short, the employee must be shown to be seeking a collective goal and may not simply advance his or her personal claim.⁸⁴

When the alleged 8(a)(1) violation turns, as in the instant case, on the employer's motive in taking an adverse action against an employee, the Board requires that the charge be analyzed under the framework set out in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must initially establish (1) that the employees engaged in protected concerted activity; (2) the employer has knowledge of that activity; (3) animus or hostility toward this activity was a motivating factor in the employer's decision to take the adverse action in question against the employee.⁸⁵

However, it should be noted that the Board has held that the existence of or lack of unlawful animus is not material when the very conduct for which employees are disciplined is itself protected concerted activity. *Burnup & Sims, Inc.* 256 NLRB 965, 975 (1981).

Once the General Counsel establishes initially that the employee's protected activity was a motivating factor in the employer's decision, the burden of persuasion shifts to the employer to show that it would have taken the same action even in the absence of the protected activity. *Transportation Management Corp.*, 462 U.S. 393 (1983).

It is also well settled, however, that when an employer's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the employer desires to conceal. The motive may be inferred from the total circumstances provided. Moreover, under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991).

Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case, as noted even without direct evidence. Evidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged misconduct,⁸⁶ departures from past practices, tolerance of behavior for which the alleged discriminatee was fired, disparate treatment of the discharged employees, and reassignments

⁸⁴ See *Gartner-Harf Co.*, 308 NLRB 531 fn. 1 (1992), where the Board noted that an employee's personal complaints about his own lack of work hours were deemed not protected.

⁸⁵ On occasion, the Board and the Circuit Courts of Appeals have added as an independent fourth element the necessity for there to be a causal nexus between the (union/concerted activity) animus and the employer's adverse action. *Blue Diamond Growers*, 353 NLRB No. 6 fn. 4 (2008).

⁸⁶ The Board advises that the investigation should be full and fair. The Board has also noted, however, that while an employer's failure to conduct a full and fair investigation into alleged misconduct of an employee may constitute evidence of discriminatory intent, such failure will not always constitute evidence of such intent. *Hewlett Packard Co.*, 341 NLRB 492 (2004).

of union supporter from former duties isolating the employee, all support inferences of animus and discriminatory motivation. *Adco Electric*, 307 NLRB 1113, 1123 (1992), enf. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp.*, 305 NLRB 219 (1991); *Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991); *Bourne Manor Extended Health Care Facility*, 332 NLRB 72 (2000); *Visador Co.*, 303 NLRB 1039, 1044 (1991); *Interterminal Service Corp.*, 309 NLRB 23 (1992); *Nortech Waste*, 336 NLRB 554 (2001); *Banta Catalog Group*, 342 1311 (2004); and *L.S.F. Transportation, Inc.*, 330 NLRB 1054 (2000); and *Medic One, Inc.*, 331 NLRB 464 (2000).

The employer's burden under *Wright Line* requires it "to establish its *Wright Line* defense only by a preponderance of evidence." The respondent's defense does not fail simply because not all of the evidence supports it, or even because some evidence tends to negate it. *Merillat Industries*, 307 NLRB 1301, 1303 (1992).

To establish an affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enf. 99 F.3d 1139 (6th Cir. 1996).

Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that, "[A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact, relied on, thereby leaving intact the inference of wrongful motive." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enf. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his union activities. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

The Board has determined that decisions affecting an employee's condition of employment may be based on its exercise of business judgment and that judges should not substitute their business judgment for that of an employer. *Lamar Advertising of Hartsford*, 343 NLRB 261 (2004); *Yellow Ambulance Service*, 342 NLRB 804 (2004).

Moreover, the Board has emphasized that the crucial factor is not whether the business reason was good or bad, but whether it was honestly invoked and was in fact the cause of the action. *Framan Mechanical, Inc.*, 343 NLRB 408 (2004).

Discussion and Conclusions

A. The Supervisory/Agency Status of Wilson Torres and Ricky Hebding

Before launching into a discussion of the substantive issues, a preliminary matter remains outstanding. The Respondent denied in its answer the supervisory/agency status of two of its employees who, as the record discloses, played a significant role in this cause—Richard "Ricky" Hebding and Wilson Torres, allegedly a field and a production manager, respectively, in the Respondent's management scheme.

Notably, throughout the hearing, the Respondent objected to the admission of any statements attributable to these persons

essentially on grounds of hearsay because of its denial that they met the statutory definitions of "supervisor" or "agent" within the meaning of the Act.

The Respondent, it would appear, seems to have conceded Ricky's and Torres' supervisory/agency status.⁸⁷ However, the party alleging supervisory status has the burden of proving not only that a given employee possesses at least one of the supervisory authorities enumerated in Section 2(11) of the Act, but also that the putative supervisor uses independent judgment in the exercise of that authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To prove independent judgment, the Board advises,

[I]t must be shown that, when the putative supervisor makes a decision exercising supervisory authority, that decision is "free of the control of others" and "not . . . dictated or controlled by detailed instructions," including the "verbal instructions of a higher authority." . . . Where the putative supervisor serves as a conduit relaying assignments from management to the employees, the independent judgment standard is not met.

PPG Aerospace Industries, Inc., 353 NLRB No. 23, slip op. at 1 (2008).

The General Counsel argues that Torres is not only a statutory supervisor under Section 2(11) but also a statutory agent under Section 2(13) of the Act. The General Counsel submits on this record that he, to a certainty, proved that Torres, as a production manager in the Respondent's administrative hierarchy, possessed the authority to hire, fire, discipline, transfer, and assign work to employees, mainly, the so-called New York installers including crew leaders like Victor Honoret and Epifanio Rosario. The General Counsel also asserts that Torres interviewed and hired employees—like Olivo—without first obtaining the approval of upper managers, i.e., Steve Schwartz and Achille, and toward that end collected necessary applications and documentation—e.g., immigration and internal revenue forms—for all such new hires. The General Counsel notes that according to Achille, production managers reported to the Respondent's vice president and operations manager, namely himself and Schwartz, respectively. The General Counsel contends that the record clearly demonstrates that during the material time frame—May through July 2, 2008, Torres, as production manager, exercised independent judgment in terms of determining daily what jobs were assigned and reassigned to the crews under his supervision. Notably, the General Counsel submits that Torres was sought out by the Elmsford and Sealrite employees (e.g., Rosario and Honoret) about work-related issues and particularly the wage issues pertinent herein, as well as getting his approval for vacation, sick, and other leave time. The General Counsel aptly notes that Torres was in fact Gene Hebding's counterpart in the Respondent's administrative hierarchy and performed essentially the same duties for Elmsford as Hebding did for Coastal. The General Counsel notes further

⁸⁷ In its brief, the Respondent does not treat at all with the complaint allegations that Ricky Hebding and Wilson Torres were supervisors and agents. This is quite contrary to the stance the Respondent asserted at the hearing, at which the Respondent's counsel interposed as a standing objection to the admission of any statements attributed to either man.

that by dint of his duties and responsibilities that Gene Hebding was a statutory supervisor at all material times, and the Respondent has even in its answer admitted as much. Torres, occupying the same position, possessed the identical authority as Gene and performed the same functions. Accordingly, Torres' supervisory status is well established on this record.

The General Counsel also contends that Torres was also a statutory agent of the Respondent under Section 2(13) of the Act.⁸⁸

The General Counsel essentially submits that the Elmsford and Sealrite installers viewed Torres as their "boss," the point person to whom they would turn to deal with employment-related issues such as wages, vacation, and leave requests; Torres also was the person known by the installers to make hiring decisions and through whom interviews were arranged and conducted. The General Counsel submits under the circumstances, as testified to by the installer witnesses in this case, the employees reasonably believed that Torres was authorized to speak for and represent the Respondent regarding issues associated with the terms and conditions of their employment.

Regarding the supervisor and/or agency status of Ricky Hebding, the General Counsel submits that he, too, on the undisputed record herein, clearly meets the statutory definitions. The General Counsel asserts that Ricky himself admitted that he was the supervisor of the Coastal crews working under his supervision, in that he possessed the independent authority to hire, fire, and otherwise discipline the installers under his supervision such as Santos and Olivo, as well as assign and transfer employees. Ricky's supervisor, Gene, also testified that Ricky was a supervisor of the installers and could independently hire and fire employees. The General Counsel also notes that the Coastal installers who served directly under Ricky's supervision testified at the hearing to a man that it was Ricky who served as the installers' immediate supervisor and to whom they reported all workplace problems such as getting the company truck repaired or serviced, whose approval was sought for vacation and sick leave, and from whom regularly they received their work assignments. All in all, the General Counsel submits that not only on the undisputed testimony of the workers he managed, but that of his own supervisors and upper level managers, Ricky Hebding met the statutory definition of supervisor as interpreted and defined by applicable decisions of the Board.

The General Counsel submits that Ricky's duties and responsibilities and his relationship with the installers also meet the statutory definition of agent under the Act.

As noted, in spite of its answer and objections at trial, the Respondent has not seriously if at all contested the supervisory (and/or agency) status of Ricky Hebding and Torres. In my view, the record clearly establishes that both of these persons were supervisors and/or agents of the Respondent during the relevant period. Not only did each possess at least 1 of the 12 statutory indicia of supervisor, but each man exercised that

authority independently. Also both persons at the least were statutory agents as they were both imbued with the actual and apparent authority to represent and act for the Respondent in the performance of their duties. It is beyond dispute that the installers under their respective administrative commands reasonably could and did view them as persons authorized to speak and act for the Respondent's management in the course of their employment. *West Bay Maintenance*, 291 NLRB 82 (1988); *Allegheny Aggregates, Inc.*, 311 NLRB 1165 (1993).⁸⁹ I would find and conclude that the General Counsel has clearly and overwhelmingly established the supervisory and/or agency status of Ricky Hebding and Wilson Torres.

B. The Substantive Issues

Turning to the substantive issues, the Respondent, as I view its position, attempts to portray the actions of the installers on July 2, as a singular act, an economic strike, the purpose of which was to force the Company to change the installers' wage rate and other terms and conditions associated with their employment. The Respondent argues that in this context the installers, at-will employees, engaged in unprotected conduct which permitted the Company to terminate them, especially since they rejected the Company's unconditional and penalty-free offer to allow them to return to their jobs. In short, the installers abandoned their jobs in pursuit of an unprotected job action and the Company did not violate the Act in such circumstances.

The Respondent's position, however, overlooks first the context of the installers' protest as well what I perceived as their objectives in staging the work stoppage on July 2.

Notably, the Respondent submits that the installers who testified at the hearing, especially the main protagonists—crew leaders, Santos, Olivo, Nieves, and Honoret—were not credible. By contrast, the Respondent asserts that its primary witnesses, Achille and the brothers Hebding, were eminently credible regarding their respective parts in the matter.

As noted previously, the General Counsel's witnesses were immigrants and not native English speakers; and I am not a Spanish speaker. I relied, of course, on the interpreter's version of the proffered testimony of the installers. As noted, I also paid particular attention to the installers' demeanor, their body language as it were, to discern not only the meaning of what they were saying but also their sincerity and straightforwardness in their presentations. My goal was to assess the installers' testimony in order to obtain an honest statement of what they viewed as the facts and circumstances that governed their decision to meet at Olivo's house on July 2.

On balance, contrary to the assertion of the Respondent, I found the General Counsel's witnesses to be very credible. The Respondent claims that certain witnesses, namely Santos, Honoret, and Olivo, in several instances were not credible and fatally so. I do not agree. As I heard them and have considered their testimony as a whole, there is no cause to discredit them,

⁸⁸ Sec. 2(13) provides: "In determining whether any person is acting as an 'agent' of another person so as to make such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

⁸⁹ It also seems apparent that the installers also viewed Ricky as a proper conduit for the expression of their complaints to upper management, namely his brother, Gene, who testified that he in turn reported to upper level company executives like Achille and Steve Schwartz.

especially for what I consider minor even negligible inconsistencies in their respective testimonies which I would attribute to understandable lapses in memory, the ever-present language, issue and, in the cases of Olivo and Honoret, victimization in my view by witnesses who later may have changed their minds about the decision they had reached on July 2.

Based on what I consider the credible evidence of record, I would find and conclude the following.

On or about May 15, 2008, the Respondent decided to change the wage structure or scheme applicable to the installers in an attempt to make the system more objective or uniform; the change was to take effect on June 1, 2008. The change, essentially to a flat rate of 8 cents per square foot of installation material to be utilized on a given work project, eliminated payment for certain “extra labor” under the old payment structure. The Respondent *verbally* (as opposed to publishing a written notice) communicated the proposed change to the affected installers through certain production managers and field supervisors; namely, Gene Hebding, Wilson Torres, Hugo Tavaréz, and Ricky Hebding, respectively. Notably, the Hebdings were not fluent in Spanish. Because the wage change was communicated by them verbally to the Dominican group, it is reasonable to infer that the installers did not clearly understand the operation, application, and implementation of the new wage structure. Administrative problems within the Company in implementing the new system may have also occurred.

During the period covering approximately May 15 through July 2, 2008—the transitional period for the wage change—crew leaders, in particular Olivo, Santos, Honoret, and Nieves, repeatedly complained to management, more particularly to the Hebdings, Tavaréz, and Torres, that there were problems and issues associated with the pay change. The problems included matters such as the installers being paid at both the old and new rates for the same projects; not being paid for all of the insulation material (the baffles) used on a job; inconsistencies between the material actually used on the job and that appearing on the job work order; and not being paid for all material used on a site preparation, height, caulking, and crawl spaces.⁹⁰ The Respondent’s managers, namely, the aforementioned Hebdings, Tavaréz, and Torres, were aware of these complaints and to their credit attempted to explain again verbally on various occasions the operation and implementation of the new wage scheme as well as the transition from the old to the new system to the complaining installers.⁹¹

⁹⁰ Even Fedham Gonzalez, currently employed by Elmsford and called by the Respondent, testified that among the points raised by the gathered installers was the “method” by which the installers were being paid; he cited by way of example being paid at the old rate of 6 cents, but without the extras along with no payment for baffles, all of which were ordinarily included in the old system. (Tr. 558.)

⁹¹ Notably, it seems clear that on occasion the crew leaders, for instance Nieves, who did not speak fluent English, communicated complaints to Gene Hebding through an office worker, Sanchez. On this point, the Respondent certainly must have recognized that non-English speaking installers required someone to speak for them to communicate their concerns. Along these lines, I believe that Santos and Olivo honestly and accurately translated Gene’s comments to the assembled installers on July 2.

Sometime in April 2007, Olivo and Santos assembled a group of Coastal installers and demanded a meeting with Gene Hebding in an effort to resolve certain wage and other work-related issues. As a result of that meeting, the parties reached a satisfactory resolution of the outstanding issues. With this successful resolution in mind, Olivo and Santos again assembled in July 2008 not only a group of Coastal installers, but also the Elmsford and Sealrite installers to meet at Olivo’s home and prepare a list of grievances consistent with their current complaints to submit to management because these complaints in their collective minds had not been adequately addressed. In this regard, based on the credible testimony of Olivo, Santos, Nieves, and Honoret, the prime actors, I would find and conclude that the meeting of the 20 or more installers was not intended to protest the Respondent’s new wage rate or to demand any change in it. The installers met to discuss their common grievances about the operation, application, and implementation—in short, the methodology of the new pay system and the discrepancies and inconsistencies they had experienced with its implementation. Therefore, in my view, the July 2 meeting of the installers clearly was for the mutual aid and protection of the assembled installers.⁹² Contrary to the Respondent, the meeting was not intended to pressure the Respondent to change the wage rate by disrupting its business.

I would also find and conclude that while some of the assembled workers *may* have had work assignments scheduled for July 2, it was not their intention to not work at all that day. Rather, consistent with what I believe is the Company’s accepted practice of allowing workers fairly broad discretion in terms of their report time, these installers would have gone to their assignments for July 2 had not other events intervened.⁹³ In my view, the installers—those who had assignments—did not intend to strike to demand wage concessions or other changes in their terms and conditions of employment. Rather, they met to air grievances and ultimately prepare a petition of their concerns and present it to management.

I would also find and conclude that while the installers did not notify management in advance of their intention to meet on July 2, they (through Santos and Olivo) attempted to inform the Hebdings before reporting to work the morning of the meeting and its purpose, as well as their intention to report for their job assignments at the conclusion of the meeting.⁹⁴

⁹² In terms of the attendees at the July 2 meeting, I will in the main rely on GC Exh. 2, the sign-in sheet. I acknowledge that there is some controversy regarding two persons whose names appear thereon.

⁹³ It is important to note that the Respondent did not produce a single document indicating that the installers had actual work assigned to them on July 2 or 3. I note that Santos and Olivo said they had work that day and the Hebdings and Achille testified that they received complaints from customers about the no-show workers. Accordingly, I assume some of the installers had work on July 2. However, the undisputed testimony of management and the installers is that their assignments were given by fax or perhaps e-mail. It is a mystery to me why the Respondent did not produce job assignment faxes, especially since the claim is that the installers did not report to their assignments and abandoned their jobs.

⁹⁴ In this regard, I have credited the testimony of Olivo and Santos that they tried to reach Ricky and Gene but were unsuccessful. It seems

Given the context of the parties' prior work relationship, given the fact of the installers' repeated unaddressed and unresolved complaints during the transition from one wage system to another, and given the installers' gathering to discuss and air their grievances with management, I would find and conclude the installers engaged in concerted protected activity on July 2. Moreover, they did not meet and stop work with the intention of forcing or pressuring the Respondent to accede to any demands or otherwise to change their terms and conditions of employment.

I note in this regard that the installers—at least those who testified at the hearing—did not object to the 8-cent pay rate. By contrast, it seems they were pleased with the change, viewing it as a raise. The problems arose in the implementation and application of the new rate. Also, contrary to the Respondent, I did not discern from their testimony that the installers were seeking an "agreement" in the collective-bargaining contractual sense. Rather, the "agreement" they sought, as I have observed and heard them (as translated), was more in the nature of a clarification or resolution of the new wage rate's component parts and applications, similar to the approach they took in April 2007. In that light, in my view, the installers on July 2 desired some meaningful attention paid to their collective issues and hoped for as satisfactory response from Gene Hebding as they had received in April 2007; after receiving such assurance, the installers would then go to work that day or when they next received a work assignment.

In my view, Santos and Olivo tried to contact first Ricky and later Gene Hebding early in the morning of July 2 to notify them about the purpose of the meeting, and that they would be reporting for work after the meeting.⁹⁵

Turning to the telephone conversation between Gene and Santos and Olivo at around 9:30–10:30 a.m., it should first be noted that Santos and Olivo were translating Gene's conversation to the group over the speaker phone. Therefore, as a practical matter, the vast majority of the installers was merely auditing the conversation and relying on the translations of first Olivo, and then Santos. Of course, the Respondent in practice utilized at various times its bilingual employees to communicate with the non-English speakers. Notably, for example, crew leader Nieves voiced his concerns about pay deficiencies and inconsistencies to the Respondent's office secretary, and Tavaréz and Torres were enlisted to communicate with the installers about the new wage rate. With this practice in mind, there is no reason to think that either Santos or Olivo did not communicate accurately Gene's comments to the group.

It is undisputed by Santos, Olivo, and Gene Hebding that the conversation turned acrimonious and contentious, with Santos

and Gene heatedly breaking off their conversation. Matters did not fare much better when Olivo took up the conversation with Gene, who also admitted he was upset and angry with the installers for not showing up for work.

Santos and Olivo testified that they tried to explain to Gene the purpose of the meeting and the installers' continuing complaints about the discrepancies and irregularities in their checks. Hebding admits discussing the wages but insisted that the installers wanted him to change the wage rate, something he said he was powerless to do. It seems that the parties may well have been talking past one another.

As noted earlier, I have found herein that Santos and Olivo in particular were highly credible, and I do not believe that they insisted that Gene change the wage rate. I believe that, consistent with their testimony, they sought from Gene resolutions for their complaints and other issues, but did not seek any changes in the wage rate with which, in point of fact, they had no issue.

In likewise, I would credit Olivo and Santos's statement that in response to their concerns, Gene Hebding told them in so many words that they could take it (the Company's way of paying) or leave it (quit), and to return the vans to the Company that day. In my view, Olivo and Santos could rightly and reasonably conclude that they were terminated at that point inasmuch as the issues complained of were not addressed, let alone resolved.

Moreover, I cannot credit Gene Hebding's testimony that he did not terminate the installers in the July 2 conversation, but rather gave them the opportunity to return to work by telling him of their intentions to do so by 5 p.m. that day. In that regard, I have credited Olivo's testimony that he received word that the Company was commencing the vehicle retrieval as early as 4–4:30 p.m.⁹⁶ on July 2.

In my view, the Respondent's decision to pick up the installers' assigned vehicles as well as their tools within a few hours of the telephone conversation—at the 1 p.m. meeting convened by Achille—further supports the allegation that the installers were terminated and that this decision was inextricably tied to their stated complaints about the new wage system's operation and application and implementation.

Then, too, there is the statement attributed to Torres, which I might note, that the Respondent did not discuss in its brief. In my view, Honoret, another credible installer witness, who participated in the meeting and at the hearing attested to the installers' concerns and their efforts to resolve them prior to July 2, testified that Torres told him that all of those at the meeting—on the list—were fired. Of course, Torres did not testify at the hearing and, aside from the Respondent's claim that he was not a supervisor, his absence was not explained. In any event, Torres' statement remains not only un rebutted, but

Ricky did not as a practice turn his phone on before a certain time, but in any case, neither of the Hebding's answered their phones until later in the morning.

⁹⁵ I might add that, consistent with the Board authorities on this point, I would deem the arguably short notice given by the installers an immaterial omission considering that the Respondent was aware of the installers' complaints and problems long before July 2 and failed to adequately address them. In all likelihood, if the installers had given more notice of their intentions, the response of the Respondent's managers may not have been different.

⁹⁶ I have taken cognizance of the Respondent's evidence—testimonial and documentary—which tended to show that some of the vehicles may have been picked up after 5 p.m. and even later in the evening of July 2. (See R. Exh. 2(a)–(g), EZ pass documentation). However, in my view, it is not so much when the vehicles were retrieved but when the decision to retrieve them was made. I believe the decision was made at about 1 p.m. at the Respondent's (Achille's) meeting of managers where the matter was discussed and the Respondent resolved to pick up the vehicles.

nearly everyone whose name appears on the sign-in sheet indeed was sent an identical termination letter.⁹⁷

It should be noted that the termination letters themselves are all identical in terms of the message conveyed, essentially, that the installer in question failed to appear at a jobsite on July 3 because he was dissatisfied with the terms and conditions of his employment and that as an “at will” employee he had no right to his position; that his deliberate failure to appear for the assigned job constituted abandonment of his job and that he was terminated; that his company vehicle (if assigned to him) would be retrieved and any other company-owned equipment should be returned to the Company as soon as possible.⁹⁸

I have considered these letters in the context of the evidence of record and the Respondent’s stated position in defense of its actions, both at trial and in its brief, and in agreement with the General Counsel, I would deem the letters to be pretextual and frankly a cover-up for the Company’s actual reasons for discharging the installers attending the July 2 meeting.

Notably, the letters make abundantly clear that the Respondent was aware that each individual installer was dissatisfied with the terms and conditions of his employment. Knowledge of their so-described “dissatisfaction” could only come from the installers themselves and/or the brothers Hebding, especially Gene who engaged in a fairly lengthy conversation with Santos and Olivo. While the letter associates the installers’ dissatisfaction with their (overall) terms and conditions of employment, the Respondent (through Gene) insisted at trial that the installers were protesting only the Company’s wage rate and refused to work at that rate. If this were indeed the case, the question arises as to why this point was not included in the letter. In this regard, in my view, the Respondent has offered a “shifting defense” which undercuts the legitimacy of its asserted reasons for the termination of the installers.

The Respondent’s position is further undercut by the claim in the letter that each installer deliberately failed to appear at his assigned job for July 3, and thereby abandoned his job. As I have noted, the Respondent did not adduce any work assignment documentation for any of the installers, some of whom testified that they were not scheduled to work on July 3. Even the Respondent’s witness, Sandy Genao, received a similar letter when it was clear that he was scheduled for vacation the next day and presumably had no work for July 3. Notable also was the claim by the Respondent that work was slow during the relevant time frame and the installers at the time were not working a full week. The unanswered question, thus, is pre-

cisely what job did the installers individually abandon on July 3?

Finally, I would note that the letters, by their very terms, tie the Respondent’s discharge decision to the installers’ purported dissatisfaction with the terms and conditions of their employment, thereby providing a discriminatory nexus and an unlawful motive to the Employer’s action.⁹⁹

In any case, I would find and conclude that the termination letters were issued as a cover-up for the unlawful action the Respondent undertook on July 2 against the installers who attended the protest meeting on July 2.

With the foregoing discussion and conclusions in mind, I would find and conclude consistent with the *Wright Line* test, that the General Counsel has fully and overwhelmingly met his burden to establish that on July 2, 2008, the installers here were engaged in protected activity; that the Respondent knew of the activity; and that the Respondent’s action—here termination—was motivated by its hostility to the installers’ action; and therefore that there was a causal connection between the Respondent’s hostility and the adverse action it took against the installers.

The Respondent has failed to prove by the preponderance standard that it would have taken the action it took against the installers irrespective of their protected activity. Moreover, the Respondent’s stated reasons were, in my view, pretextual and a mere cover-up for its illegal action. *Rochelle Waste Disposal, LLC*, 353 NLRB No. 38 (2008); *Blue Diamond Growers*, 353 NLRB No. 6 (2008).

CONCLUSIONS OF LAW

1. The Respondent, Coastal Insulation Corporation, and Elmsford Insulation Corporation, and Sealrite Insulation of New York, a single employer, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7)) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging the following employees on July 2, 2008:

Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario.¹⁰⁰

⁹⁷ I note that installer Epifanio Rosario corroborated Honoret, whom he testified told him that Torres was told about the meeting and its purpose—about the pay—and that Honoret told him that Torres said that all who signed were fired. (Tr. 300.) In my view, Rosario was a credible witness although his memory was not particularly sharp. Nevertheless, he appeared to be straightforward and honest, and did not overstate or exaggerate. Notably, according to Rosario, Honoret told him of Torres’ comment at the July 2 meeting.

⁹⁸ The termination letters are identified in GC Exh. 3(a)–(p). Notably, Gene Hebding and Wilson Torres were the signatories on these letters. I should note that Torres’ signature on these separation letters further erodes any argument that he was not one of the Respondent’s supervisors.

⁹⁹ The letters are troubling in another respect, especially since the employees here are immigrants. As noted, the Respondent informed each installer that because he was an at-will employee, he had no legal right to his “position,” which could mean the job itself or a failure to report for work because of his dissatisfaction with the terms and conditions of his employment. If the Respondent was suggesting that the installers had no right to stop work, this is not only misleading, it is incorrect as a matter of law as employees have a statutory right to strike or otherwise protest the Employer’s action to vindicate rights guaranteed them under the Act. The letters here could conceivably constitute a separate 8(a)(1) interference charge.

¹⁰⁰ I have determined that these persons were signatories on the sign-in sheet (GC Exh. 2) with the exception of Rober and Manuel Luna who disavowed any statements attributed to them by installer Honoret, who testified that he secured Rober and Manuel’s authorization to

3. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

4. The Respondent has not violated the Act in any other manner.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, I find it must be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent's having discriminatorily discharged its employees Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario, it must offer them immediate reinstatement to their former jobs or, if their former jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of wages and benefits. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I also recommend that within 14 days after service the Respondent be ordered to post by Region 22 at its East Windsor, New Jersey facility copies of an appropriate "Notice to Employees," a copy of which is attached hereto as "Appendix," for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Respondent's obligation to remedy its unfair labor practices.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁰¹

ORDER

The Respondent, Coastal Insulation Corporation, and Elmsford Insulation Corporation, and Sealrite Insulation of New York, a single employer, East Windsor, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effec-

include their names on the list. In his brief, the General Counsel withdrew the complaint allegation pertaining to these two installers based on their testimony. I note that neither Rober nor Manuel was issued a termination letter. I leave to the compliance stage of this proceeding to determine whether any of the named discharges who did not testify at the trial resumed their employment with the Respondent at any time after July 2, 2008.

¹⁰¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

tuate the policies of the Act.

(a) Within 14 days from this Order, offer Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario whole for any loss of earnings and other benefits as a result of the discrimination against them in the manner set forth in the Remedy section of the decision.

(c) Within 14 days from this Order, remove from its files any reference to the unlawful layoff and, within 3 days thereafter, notify Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in East Windsor, New Jersey, copies of the attached notice marked "Appendix."¹⁰² Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted.¹⁰³ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

¹⁰² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

¹⁰³ Because the record indicates that many of the Respondent's employees do not speak English fluently, I recommend that this notice be posted in both English and Spanish. *North Hills Office Services*, 346 NLRB 1099 fn. 4 (2006).

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the "Notice to Employees" to all current employees and former employees employed by the Respondent at any time since July 2, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 2, 2009

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by the Act.

WE WILL, within 14 days from the date of this Order, offer Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharges of Eduardo Olivo, Samuel Figaro, Ramon Fermin, Dioni Gonzalez, Sandy Genao, Victor Nieves, Frederico DeLeon, Odalis Gonzalez, Sergio R. Santos, Agelis J. Gonzalez, Anbiory R. Gonzalez, Jairo Gonzalez, Rafael Gonell, Rafael Sanchez, Cesar Cardenas, Jorge Jimenez, Fedham Gonzalez, Jose M. Bautista, Victor Honoret, and Epifanio Rosario, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the layoffs will not be used against them in any way.

COASTAL INSULATION CORPORATION, AND ELMSFORD
INSULATION CORPORATION, AND SEALRITE INSULATION OF NEW
YORK, A SINGLE EMPLOYER